(23,848)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 257.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BERNARD J. CARR.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the supreme court, county of Erie	1	1
Summons	1	1
Amended complaint	2	2
Amended answer	7	4
Order of substitution	11	6
Clerk's minutes	13	7
Case and exceptions	16	9
Testimony of Henry W. Stewart	16	9
James O'Brien	35	18
Bernard J. Carr	48	25
James O'Brien (recalled)	58	30
Henry W. Stewart (recalled)	58	30
Wm. J. Ryan	61	31
Albert H. Tucker	64	32
Charles A. Haak	66	33
Edward J. Yawman	67	34
August Trouillie	68	34
Robert Arras	69	35
Joseph Snell	70	35
James A. Carpenter	70	35
Frank E. Cramer	72	36

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	Original	Print
Both sides rest	72	36
Motion for nonsuit and ruling thereon	72	36
Defendant's exceptions	75	38
Charge to jury	76	38
Verdict	84	42
Judgment	85	42
Order denying motion for new trial	87	43
Exhibit "A"—Motion for new trial	88*a*	44
Opinion	88	45
Notice of appeal	100	51
Stipulation as to record	102	51
Exhibit C—Report of freight and other cars, November 18, 1910, from Rochester to East Buffalo	104	52
Affidavit of no opinion in the appellate division	106	53
Order of appellate division affirming judgment	108	53
Judgment of affirmance	111	55
Order of appellate division denying leave to appeal to the court of appeals	114	56
Opinion of Judge Cuddeback on motion for leave to appeal to the court of appeals	118	57
Order of Judge Cuddeback denying leave to appeal to the court of appeals	120	57
Stipulation designating papers to constitute transcript	122	58
Certificate of clerk of the supreme court of the State of New York, county of Erie	123	59
Petition, assignment of errors, prayer for reversal, and allowance of writ of error	124	60
Copy of bond and its approval	141	69
Writ of error and allowance thereof	146	73
Certificate of lodgment	149	75
Citation and service	151	75
Clerk's return to writ of error	153	76

a STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

BERNARD J. CARR, Plaintiff-Respondent,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant-Appellant.

APPEAL BOOK.

Hamilton Ward, Attorney for Plaintiff-Respondent, 7 and 8 Erie Co. Bank Bldg., Buffalo, N. Y.
Hoyt & Spratt, Attorneys for Defendant-Appellant, 77 West Eagle Street, Buffalo, N. Y.

[Endorsed:] Filed Erie Co. Clerk's Office, June 12, 1913.

1 STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

Supreme Court, County of Erie.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

Summons.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this Summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 5th day of June, 1911.

HAMILTON WARD,
Plaintiff's Attorney.

Office and P. O. Address, 7 & 8 Erie County Bank Bldg., Buffalo, N. Y.

2 *Amended Complaint.*

Supreme Court, Erie County.

BERNARD J. CARR,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiff, for his amended complaint, complains of the defendant, by his attorney, Hamilton Ward, and for his cause of action alleges:

First. That the defendant is, and at all times hereinafter mentioned was a domestic railroad corporation, engaged in maintaining and operating a steam railroad in and through various portions of the State of New York, and especially in and through the Town of Tonawanda, Erie County, N. Y., and that it has its office and principal place of business in the City of New York.

Second. That on or about the 18th day of November, 1910, and for sometime prior thereto, the plaintiff was in the employ of the defendant as a brakeman.

Third. That on the 18th day of November, 1910, the defendant operated a freight train over its tracks in the Town and City of Tonawanda, Erie County, N. Y., and that the plaintiff was em-
ployed thereon. That in placing and switching various cars
3 of said freight train, it became necessary to push certain cars upon a switch, in order to clear the track for an approaching passenger train, and that it became the duty of the plaintiff, as such brakeman to ride upon the cars being so pushed, for the purpose of controlling their movement by means of a hand brake, located thereon. That such hand brake, operated upon a brakeshoe, which was also connected with the air brake system of the said train and cars; that the said train and cars were equipped with air brakes, which involve a hose connection between the cars and between the cars and the engine, and that any sudden breakage of such hose connection operates to put the air brakes on suddenly. That the cars upon this train were equipped with such air brakes, and that at the end of each car was what is known as an angle cock, which is used to turn off the air when cars are separated from each other, or from the engine, so as to prevent the sudden application of the air brakes, as aforesaid.

And the plaintiff further alleges, that one of the cars, which he was required to control, was connected with the engine by an air hose, while such movement was being made. That when the time came to disconnect such engine, the person, charged with that duty, and who was in the employ of the defendant, proceeded to separate such car and engine, and at the same time attempted to turn the angle cock to prevent the sudden application of air to the cars upon which the plaintiff was riding. That such angle cock was broken, insufficient and defective, so that it could not be turned,
and did not shut off the air, and that as a result thereof,
4 the air was suddenly applied to the cars upon which the plaintiff was riding, causing them to suddenly stop with a

violent jerk. That the plaintiff was on the top of a box car, endeavoring to tighten the hand brakes which, operated by a brake wheel, elevated somewhat above the top of the box car. That this brake was so constructed that when the air brake went on, such brake wheel would suddenly jerk in a reverse direction from that in which it was being turned. That most of the cars, owned or operated by the defendant, were so furnished and equipped that when this jerk came, it came in the direction in which the brake was being turned, and not in the opposite direction, with which latter type of cars the plaintiff had had no experience, and concerning the operation of which he had not been warned or instructed. That such sudden jerk, and the sudden jar and stoppage of the car, caused the plaintiff to lose his balance and fall to the ground, receiving the injuries to be hereafter set forth.

And the plaintiff further alleges, that the defective and imperfect angle cock, as before set forth, and the construction of the brakes upon the car upon which the plaintiff was riding, causing them to operate in a reverse direction when the air was applied, constituted a defect in the condition of such cars and the attachments thereto belonging, and that such defect could have been discovered by the defendant by reasonable and proper care, tests and inspection, and was not so discovered by the defendant or, if discovered by the defendant, was permitted to continue in the dangerous and
5 unsafe condition in which they were at the time of the accident. That such accident was brought about solely and wholly by reason of the negligence of the defendant.

Fourth. And the plaintiff further alleges, that by virtue of an Act of Congress, known as an act, relating to the liability of common carriers by railroads to their employees, in certain cases, approved April 22nd, 1908, and by virtue of the certain amendments thereto approved April 5th, 1910, jurisdiction was conferred upon the State Courts of the State of New York to enforce the liability of railroad corporations to their employees, as defined in such acts of congress.

And the plaintiff further alleges, upon information and belief, that on the 18th day of November, 1910, the said Acts were in full force and effect, and that upon that day, the defendant was a common carrier, engaged in commerce between the several states of the United States, and between the states of the United States and a foreign nation, to wit, the Dominion of Canada, and that the plaintiff was employed by the defendant in such commerce at the time of his injury, and that such injury occurred through the neglect of the defendant, its officers, agents and employees, and by reason of the defective and insufficient condition of its appliances, cars and machinery, as hereinbefore set forth.

Fifth. That by reason of the matters before set forth, the plaintiff has been seriously and permanently injured. He has
6 suffered and still continues to suffer much pain; the bones of his right foot and leg have been smashed and broken, and he has suffered other injuries thereto; he has been lacerated and injured in his head, body and limbs; has been put to much

expense for nursing, medicines and medical attendance; has been incapacitated from labor; permanently crippled and damaged in the sum of twenty-five thousand dollars ($25,000.00).

Wherefore, plaintiff demands judgment against said defendant in the sum of twenty-five thousand dollars ($25,000.00), besides the costs of this action.

HAMILTON WARD,
Attorney for Plaintiff.

Office and P. O. Address, 7-8 Erie County Savings Bank Bldg., Buffalo, N. Y.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Bernard J. Carr, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing Amended Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those
7 matters he believes it to be true.

BERNARD J. CARR.

Sworn to before me, this 20th day of March, 1912.
JAMES H. BREEZE,
Notary Public.

Amended Answer.

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The defendant answering the amended complaint of the plaintiff in the above entitled action:

1. Admits the allegations of the complaint contained in the paragraphs or subdivisions thereof numbered "First" and "Second."

2. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint and each and every of them, contained in the paragraphs or subdivisions
8 thereof numbered "Third," "Fourth" and "Fifth," except that defendant admits that on the 18th day of November, 1910, the plaintiff then and for some time prior thereto in the employment of the defendant as a freight brakeman, met with an accident at North Tonawanda, N. Y., and sustained certain injuries; the Acts of Congress referred to in the complaint were in full force and the defendant was a common carrier, engaged in interstate commerce and commerce with the Dominion of Canada.

Second.

For a second, separate and distinct defense to the alleged cause of action in the complaint set forth, the defendant further avers and alleges that the said accident to the plaintiff occurred, and the injuries to him were sustained by reason of his own negligence, and that if any negligence other than that of plaintiff caused, or contributed to cause said accident and injuries, it was the negligence of a competent fellow servant or of competent fellow servants of the plaintiff.

Third.

For a third, separate and distinct defense to the alleged cause of action in the complaint set forth, the defendant further avers and alleges that the said accident to the plaintiff occurred, and the injuries to him were sustained while he was in the employment of the defendant as a freight brakeman; that said employment
9 was at the time plaintiff entered the employment of the defendant and continued to be, an obviously dangerous one, the risks incident to which were, and continued to be obvious and well known; and were obvious and well known to the plaintiff and assumed by him at the time he entered said employment, and obvious and well known to him, and assumed by him, during the entire time of his continuance in said employment; and that the accident and injuries complained upon arose from and were risks incident to said employment, which risks the plaintiff took and assumed at the time he entered and during his continuance in said employment.

Wherefore, the defendant demands that the complaint be dismissed, with costs.

HOYT & SPRATT,
Attorneys for Defendants.

77 West Eagle Street, Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

M. C. Spratt, being duly sworn, deposes and says; that he is a member of the firm of Hoyt & Spratt, and is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the
10 same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by the defendant is that the defendant is a corporation and not within the county where the deponent resides and has his office and none of its officers reside or are within the county where deponent resides and has his office and capable of making his affidavit.

That the sources of deponent's knowledge and the grounds of his belief are from correspondence had with defendant and correspondence and conversations had with the officers and representatives of the defendant, and from reports of investigations of the de-

fendant's agents, which correspondence and reports are now in deponent's possession.

M. C. SPRATT.

Subscribed and sworn to before me this 20th day of April, 1912.
H. W. HUNTINGTON,
Notary Public, Erie Co., N. Y.

11 *Order of Substitution.*

At a Special Term of the Supreme Court held in and for the County of Erie, at City and County Hall, in the City of Buffalo, on the 3rd Day of October, 1911.

Present: Hon. Warren B. Hooker, Justice.

BERNARD J. CARR, Plaintiff,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant.

On reading and filing the consent below written and on motion of Hoyt & Spratt it is

Ordered that Hoyt & Spratt be and they hereby are substituted as attorneys for the defendant, The New York Central & Hudson River Railroad Company, in the above entitled action in place and stead of Alex. S. Lyman.

Granted Oct. 3, 1911.

PERRY E. WURST,
Sp. Dep. Clerk.

Enter:
W. B. H., *J. S. C.*

12 It is hereby consented that Hoyt & Spratt be substituted as attorneys for the defendant, The New York Central & Hudson River Railroad Company in the above entitled action, in place and stead of Alex. S. Lyman.

Dated, New York, Sept. 30th, 1911.

ALEX. S. LYMAN, *Defendant's Attorney.*
THE NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY,
By E. L. ROSSITER, *Treasurer.*

STATE OF NEW YORK,
County of New York, ss:

On this 30th day of September, 1911, before me personally appeared Edward L. Rossiter, to me personally known and known to me to be the Treasurer of The New York Central & Hudson River Railroad Company, the corporation described in and which executed the foregoing consent, who, being by me duly sworn, did

depose and say that he resides in the town of Greenwich, Fairfield County, Conn.; that he is the Treasurer of the New York Central & Hudson River Railroad Company; that he executed the foregoing consent in behalf of and as the act and deed of said The New York Central & Hudson River Railroad Company, and that he
13 so executed the same by authority of the Board of Directors of said company.

ALBERT B. GUENCER,
Notary Public, New York County.

Clerk's Minutes.

At a Term of Supreme Court, Part 2, Held at the City and County Hall, in the City of Buffalo, in and for the County of Erie, on the 21st Day of June, 1912.

Present: Hon. Chas. B. Wheeler, Justice Presiding.
Court convened at 10 A. M.

1089.

BERNARD J. CARR
against
THE N. Y. C. & H. R. R. Co.

Hamilton Ward.
Hoyt & Spratt.

Jury.

George H. Zittel,
George Henderson,
George Leibold,
John G. Herb,
Wm. A. Naab,
Edward A. Klein,
Carlton E. Eno,
Ernest L. Green,
Kirk O. Stevens,
Anthony Alf,
John D. Langner,
Arthur H. Bernhardt.

14 *Witnesses for Plaintiff.*

Henry W. Stewart.

Recess until 2 P. M.
2 P. M. Trial proceeds.

Witnesses for Plaintiff.

Henry W. Stewart, re-called,
James O'Brien,
Bernard J. Carr,
Jos. Burke, M. D.
Alfred W. Bayliss, M. D.

Henry Stewart, re-called.

Plaintiff rests.

Court adjourned to June 25, 1912, 10 A. M.

June 25, 1912.

Court convened at 10 A. M. Trials proceeds.
Counsel for defendant moves for a nonsuit.
Motion denied.

Witnesses for Defense.

William J. Ryan,
Albert H. Tucker,
Chas. I. Haak,
Edw. W. Yawman,
August Ironvillie,
Albert Arras,
Joseph Snell,
James A. Carpenter,
William H. Marcy, M. D.,
Frank E. Cramer.

Defendant rests.
Evidence closed.
Counsel for defendant renews motion for a nonsuit. Also moves for a direction of a verdict for no cause of action.
Motion denied.
Counsel sum up.
Court charged the jury who retire in custody of a sworn officer of the court to deliberate upon their verdict.

June 26, 1912. Court convened at 10 A. M.
Verdict.
The jury return into court again bringing with them a sealed verdict in which they say they find a verdict in favor of plaintiff for the sum of $3500.00.
Counsel for defendant moves for a new trial

Motion denied.
I hereby certify that the foregoing is a true copy of the Clerk's Minutes in the above entitled action.
Dated Sept. 9, 1912.

C. W. CHAPIN,
Dep. Clerk.

16 *Case and Exceptions.*

Supreme Court, Erie County.

BERNARD J. CARR
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Appearances:

For the plaintiff, Hamilton Ward, Esq.
For the defendant, Messrs. Hoyt & Spratt.

Tried at Buffalo, N. Y., beginning on Monday morning, June 24, 1912, before the Honorable Charles B. Wheeler, Justice, and a jury.

Mr. Ward opens for the plaintiff.

Mr. SPRATT: Defendant waives the opening.

HENRY W. STEWART, called on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. WARD:

I am a New York Central freight conductor and have been connected with the New York Central since November, 1894. That is about 18 years next November. I have been conductor since
17 '98. At the time that Carr got hurt I was running between Buffalo and Rochester by way of the Falls Road; the Lockport branch, and vice versa. I had charge of a drop and pick-up train, a freight train. That is, we would drop cars and pick up cars at the various stations as we went along. We started out from Rochester at 12:30 noon, getting into Buffalo in the night time. Some days we would make better time than we would others; probably 12 to 14 hours on the average. I don't remember whether that was Mr. Carr's first trip or not. He was an extra man, he was off the extra list at Buffalo. The only instructions we give him is the work that we have to do in the entire trip. When there was something particular to do I told him about it, and that was the extent to which he was instructed. There were two brakemen, a flagman and myself in the crew. Carr was acting as what we call middleman. That is a brakeman. The names of the other brakemen were James O'Brien and Frank Cramer. There is a caboose on my train. The name of my engineer is Walzer. The fireman is George Harris. I keep a record of the cars that we take on and take off. We have what is called the train-book. There is a record in East Buffalo yard office, one copy to New York and one to East Buffalo. One is a carbon copy of the other. That report is on blanks furnished by the company. This is the report which is produced here in court. It is in lead pencil, in my handwriting. My name is signed to it on the back. And this is a slip entitled

"New York Central & Hudson River Railroad. Report of
18 freight and other cars westward, date, October 19th, 1910, from Rochester to East Buffalo, via Falls Road." This report has 12 columns. In the first column is the number of the car on my report. In the second column is the name of the road to which the car belonged, the initial. In the third column is the kind of car, as "Box-car" or "Flat-car." In the fourth column are set those cars that are loaded with the car numbers. In the fifth column are set those cars that are empty, with the car numbers. The sixth column is a blank column entitled "Check." The seventh column is "Where taken," initials and numbers which indicate the station. The eighth column is entitled "Where left" and gives initials and numbers indicating where the car was left. The ninth column is headed "P. F. X." that means preferred freight, marked by an "X" if the car is preferred freight as you see here (indicating). The next column is headed "Contents." Under a head which is over that, and the following column, is "Weight in tons," which covers the next column and the subsequent column. That is the weight of the contents of the car. And the next column is the right weight of the car, when empty. And the last column is the final destination. When we pick a car up, say at Medina, I have a slip, way-bill of the car. That is handed to me by the Agent or his help at Medina. Lots of times the cars are marked. That is, a card on the car with the name of the destination. These cards that I receive, or these way-bills that I receive from the agents have the car
19 numbers on so that I can identify the car, and those car numbers are conspicuously painted on the outside of the car. We left Rochester with thirty-three cars, thirty-four cars including the caboose. And some of those were loaded and some were empty. In this column headed "Where taken" it is all arranged in order, Rochester first and then the next station. I mean where taken on At Station R-12 we took on 3 cars. That station is Spencerport. Then at Station R-24 we took on 3 more cars. That is Holley. Those cars that I took on at Holley were destined for Ohio street, Buffalo, Cleveland, Ohio, and East Buffalo. Ohio street, Buffalo, is where the freight is loaded on to the lake boats that go up the lake It is lake freight. The next station that we took on a car was R-27 Fancher, and that car was destined for Albion. The next station that we took on a car was R-42, Medina. We took 11 cars at Medina. The head car was Lockport; the next car was North Tonawanda; the next was Batavia; the next was Memphis, Tennessee; the next was Pittsburg, Pennsylvania; the next two were Oakfield, New York; the next was Ohio street; the next was Indianapolis, Indiana; the next was Collingwood, Ohio. The next was for Buffalo, and the next was Jamestown, New York. We made two more stops after that; that is, that we did work at. There are other stops as we come along like that, and for instance take on a number of cars there at Medina. Those cars are put all together in the train in one place, or are distributed through the train, depending on their destination.
On some occasions I line them up according to their destina-
20 tion; in other cases I pick them up and do that work at other points between there and Lockport, or Buffalo. So that in

a pick-up train like this cars are likely to be moved back and forth in the train at any station, depending upon the exigencies of the traffic. That is all done by the same crew. We do not have one crew for the cars that go out of the state, and another crew for cars that stay in the state. Among the cars that we picked up at Medina was a "Pensylvania Lines," a box-car. That is No. 44 on our report. The number of that car is 576204, and that car was taken on at Medina. I cannot tell whereabouts in the train that was put at that point. It was taken on undoubtedly behind the other drop cars that we had at that time, and taken on and put in the train with these other cars that we took on at Medina. Cars were taken on at Medina that were going to Collingwood, Ohio; Memphis, Tennessee; Pittsburgh, Pennsylvania, and Indianapolis, Indiana. These were all taken on at one time. We found them there together at Medina, on the same track, and we put them in this same train. Then we carried them from Medina to Tonawanda. We did not take any cars with foreign destination out of the train before we got to Tonawanda. They were in the train at the time we got to Tonawanda. At the time we got to Tonawanda we had 28 cars in the train, including the two cars left at Tonawanda. About 8 cars destined for points outside of the State of New York were in the
21 train at the time we reached Tonawanda. They were scattered through the train, according to the records here. When we got to Tonawanda we were going to cut out some of those cars. We were going to cut out at Tonawanda two cars marked "B-11" in the "Where left" column. "B. O. 11" means North Tonawanda. Those two cars were New York Central & Hudson River Road 71385. A gondola car that had a load of 40 tons on the car, and the car itself weighed 17 tons. We had picked up that car at Medina; also a Pennsylvania Railroad boxcar. Its number was 576204. That car was destined for Batavia. There was a 4 ton load on it and the car itself weighed 15 tons. That is the car on which plaintiff claims the accident occurred.

There appears to have been erasures in this report as to that particular car. Those erasures came to be made on account of adding up the tonnage; I made a mistake in adding it up and I rubbed out the "2." There appears also to be an erasure as to the tonnage of the car and the point of destination. I started to make it "North Tonawanda" and the car was destined to Batavia. The "N" is started; I started to write "North Tonawanda," I erased it and made the final destination at Batavia. I believe there is no erasure under the column of "B. O. 11," but I couldn't say. It might have been. The "X" mark that is put in this tenth column means that that is preferred freight. Preferred freight, generally
22 speaking, is merchandise, or something that has a preferred movement. Brick or tile are not preferred on all occasions, unless it is a preferred shipment. This Pennsylvania car was taken on at Medina and left at North Tonawanda, to take the road that runs from Tonawanda to Batavia, called the Peanut Branch. I put an "X" opposite that Pennsylvania car in the preferred column and then erased it. I don't recall why now. There

were no other cars to be taken out of this train of 28 cars at Tonawanda except these two. We took them out at North Tonawanda. We arrived at North Tonawanda—at 10:55 P. M., and departed at 10:45 P. M. on this same day that is on there, the 18th of November. I gave orders to the two brakemen that were on the head end of the train; brakemen O'Brien and Carr. I told them that the head two cars went to Tonawanda, to set them in on the Lockport Branch. Those were the two head cars on the train. They had been proceeding as a part of this train down to this point and we wanted to get rid of them and go on with the rest of the train. They were on the head end of the train. The gondola was next to the engine. That was a New York Central car.

I made no especial examination or inspection of these cars myself when we took them on at Medina, nor at any point from there on down to the time when they cut them out. My train was equipped with air brakes. An air brake outfit means that there is an air-container on each car which receives its supply of compressed air from the engine and each car is connected with another
23 with a hose. Brakes are applied by the air being let out; the brake is released; that is, the brake is—the pressure is released, rather, by putting the air on by pumping the air into the cylinders. If the air goes out of the cylinder then the brake is applied. That is the way in which brakes are ordinarily applied, they release the air from the cylinder. In order to get the brakes off after they have been applied once they have to pump more air in the cylinder; or bleeding them from the bleeding-cock that is underneath the car. When one separates the cars by disconnecting the couplers one also separates the air hose. There is a coupling on the end comes down in a position of that kind (indicating) where they place it together, and it slips into grooves that holds it; that is, there is a piece of hose on each car and at the end of that hose is a kind of a coupling. That makes an air-tight passage, and that is opened by hand, by twisting them around. There are cocks or things like faucets, to shut off the air, on either side of the point where you are going to make the break. These are called angle-cocks. Thy are located right on the end of the train line, the iron pipe that projects out from the end of the car. They are from two feet to two feet and a half from the point where it is broken. I did not make any examination of those angle cocks prior to the accident. The company has a book of rules, which the men have, which governs the operation of the air.

Counsel handed book of rules to witness, who examined same.)

24 (Rules 48 and 49 marked "Exhibit A" and "Exhibit B" for identification respectively.)

The practice is to close those angle-cocks on either side of the break before the break is made. That is done by hand, and it is intended to be done by hand, not by machine, wrench or anything of that sort.

The train got to North Tonawanda, and when we came to a

stop was on the main track leading from Tonawanda to Lockport, and the engine was headed toward Buffalo. I was at the rear end of the train. Previously to that time I had given the orders to O'Brien and Carr to cut out those two cars. I am not sure that I personally told Carr on that occasion, but it is rulable to instruct the both men what you have to do at that point. O'Brien was an experienced man The train came to a stop there, and this track that we desired to set these two head cars off on was running parallel with the track that we were standing on, on the right-hand side facing toward Buffalo, the very next track. The movement that had to be made to get those cars off the head end of the train was to cut behind the two cars and draw up over a switch and back them in on the track. The engine would do that. Then the engine would cut loose from those two cars and return to the train, couple onto the balance of the train and proceed. The balance of the train could not proceed until we took those cars off the head end and placed them on the side track.

The first I heard of the accident was when the rear of
25 the train drew up there and we stopped and picked Mr. Carr up. After we came to Tonawanda there was nothing else to do, except to cut those cars off. There were no cars to be taken on there. And I did not have to give any further orders in order to have that done. I had given the orders that were necessary. And then after that was done the engineer would go ahead with the train without any further signal from me. Ten minutes intervened between the time the train stopped there until it started up again. All of the crew were under my orders, the engineer as well as the fireman, to a certain extent, and the trainmen. That is, the movements of the train I have control of. I did not have to consult with the yardmaster or anybody of that sort. After the train has stopped about 10 minutes then it started up in its regular way to go on to Buffalo. It stopped again to pick up Mr. Carr, who was injured. The engineer stopped it with the air. That was the first that I knew anybody was hurt. I got off and found Carr on the ground there. O'Brien was with him. These men have lanterns, each man has his own lantern. I don't remember whether or not Carr had his lantern when we picked him up. We got him in the caboose. He was able to walk on one foot; he wasn't able to walk without assistance. We brought him to Buffalo, and I sent for the ambulance and brought him to the hospital.

I never made any examination of that Pennsylvania car that they set off there at North Tonawanda. I haven't had the opportunity since the accident. On some Pennsylvania cars, the
26 brake turns in a different direction from the other cars, the older type. I know of no other kind of a car except the older type of Pennsylvania cars within recent years that does that. When the air is suddenly released on a New York Central car, for instance, the brake-wheel itself does not move. The chain—there is a chain there that is—there is a chain attached from the brake-riggings to the staff, which, if slack in there it does not move the

shaft itself when you — applying it or releasing it. If the air is released on a New York Central car and the hand brake is set by hand—it remains tight; the staff remains tight. There is nothing to move the wheel in the air at all, only when you are using it by hand. If you set the brake yourself by hand you move the wheel yourself and set it, but the air doesn't have anything to do with it. When the air is suddenly released that does not make the wheel go around. These old Pennsylvania cars are the same construction, only they work reverse to the air, some of them. I couldn't say whether this one was one of the older type or not. I had never said anything to the plaintiff here, Carr, about that peculiarity of the older type of Pennsylvania cars. There was no warning or instruction given the men generally so far as I know about, only when they are told to take no chances; no particular warning about this kind of cars. The effect when one is setting up one of those brakes by hand and the air is all connected up, if the air was suddenly broken on a New York Central car, the brake would pull much easier, because the air works,
27 travels the same way that the purchase is. When the air hose is suddenly broken that makes the wheel spin in the direction you are pulling it, only from your own purchase that you are putting onto the wheel. The air wouldn't affect it, only it would set the brakes tighter; it would pull the wheel a great deal more on the older Pennsylvania car. When the air was suddenly released, the brake will pull in the opposite direction, and that will be a violent pull, a strong pull. The distance around that the wheel is liable to spin would depend upon how tight the brake was set by hand before, it might be a matter of a foot or two, more or less. That is such a violent shock that a man cannot hold it by hand. I have known that peculiarity of this type of car ever since the air has been in operation. I started in as a brakeman. It does not happen every day that an air hose is separated without the angle-cocks being turned when a man is setting up.

The two-sheet form C. A. 14, entitled "The New York Central & Hudson River Railroad. Report of Freight and other Cars, November 18th, 1910, from Rochester to East Buffalo" received in evidence and marked "Exhibit C."

What car was next to this car when it was being cut out I would not know from independent recollection. So far as I observed him he was a careful man. It is part of the brakeman's duty to get up on top of it and set the handbrake. That is understood without any particular orders. And that is so as to keep control of the
28 car after the air is released. It is not his business to get up on the car before it is started to be pulled away and set the brakes; that is, before it is cut from the remainder of the train. It is after the car is placed on the branch. Some of these wheels that we handle the brake with are a little further above the car than others. I do not know about how high it was on that Pennsylvania car because I was not on it. That Pennsylvania car had an upright rod with a wheel on top at one end, and the other a flat

wheel down under the car. On most cars there is only one upright; that is, box cars. At the point where this upright rod is, at that end there is a little platform, a little step, fastened on the end of the car. I couldn't say for sure whether there was on this car. Generally that step is down about 12 or 18 inches. When a man sets that brake he sometimes stands with one foot down on that step and the other on top of the car; sometimes both feet on the step. There is no objection, no special way that a man is supposed to stand. He stands to his own advantage. There is a wheel with ratchets. And there is a dog that you press into that ratchet to engage it. And when you are tightening that brake up that dog is out, and then when you get as far as you can pull it you kick that dog in so that you can get a new hold. Some do it that way. I don't. I hold my foot against the dog, which keeps it in place; so that it will hold it there. There is no particular rule about that that I know of; nothing in the books about it. Nothing was said to me by Carr about how he should do that particular thing.
29 On some cars there is a spring that holds the dog up against this ratchet. I do not know whether there was on this car. Some cars are equipped with a dog that has a weight on the end of the ratchet that holds it up tight on the wheel. Some cars are otherwise. With some cars you have got to push it in with your foot.

Cross-examination by Mr. SPRATT:

I usually started out from Rochester about 12:30, and I usually reached Buffalo from 10 o'clock up until as late as 2 or 3 in the morning. We varied in different trips with the amount of work we had to do. This was known as the pick-up train. We went from station to station and left cars that were destined for those stations, and took on cars that were destined further on. We had from 15 to 18 regular stops on that line from Rochester to Buffalo. We had 34 cars including caboose, when we started out from Rochester. When we reached Buffalo we had 27 including caboose. We handled on that trip from Rochester on November 18th, 1910, 65 cars. So the difference from what we had when we started and when we got to Buffalo represented movements of taking on and leaving cars at these different stations. The ordinary freight train has two brakemen besides the conductor, and ours being a pick-up train had an extra brakeman. So that we had three. I can't recall how often Mr. Carr had been with me before the day of the accident. I noticed him the day of the accident handling cars, before the time of the accident. He appeared to know his
30 business. He did not need any instructions so far as I could see. Brakeman O'Brien had been with me for several weeks. He was an experienced man. The other brakeman was Frank Cramer. I couldn't say how long he had been with me. He was an experienced man also. They change so often that you can't keep track of them without looking your records up. O'Brien was at the front end of the train and Cramer had the back, and Mr. Carr was in the center. He was called the middle man, who was

to assist the other man in leaving and backing cars up. He was called the extra man. As we got along at these different stations where we took off cars from our train we would put them in on the sidings, and take on cars and attach them to our train. In that movement it was necessary to cut off the engine and attach it a great many times from the time we left Rochester. We would detach the engine from the train a great many times, and many times we would cut behind cars that were attached to the engine. When it was necessary to cut the engine off the brakeman would uncouple the hose, turn the angle-cocks, and then uncouple. I speak of Tonawanda for short, meaning North Tonawanda. When we take on a car we have the way-bill showing where it is going, then we make up our train sheet. That has been introduced in evidence here "C." As a rule you will put them on from station to station as you pick them up unless something calls you at the head of the train, that you can't get back to do it, then you do it at some other intermediate point, as soon as you get an op-
31 portunity to get back to the caboose to do it. Because these reports are made in the caboose all over in the division.

According to my report here I got New York Central car 71385 and Pennsylvania car 576,204 at Medina. They were both loaded cars. I knew that they were to be taken off at North Tonawanda. The New York Central car was destined for North Tonawanda proper. That was to remain there, but the Pennsylvania car was destined for Batavia. They were both loaded cars. We never pick up cars at North Tonawanda on that run. There are other trains that take care of that, trains running between the Bridge and Buffalo. So that when we got to North Tonawanda that is our last stop until we reach Buffalo, unless we are otherwise directed. So that we make no inquiry as to whether other cars are there for us to take or not. If there are other cars they come to us and let us know. Our engineer knew from our instructions that we were going to stop there. We had two cars to leave at North Tonawanda. I believe it was at Lockport Junction that I gave them those instructions. That is practically the place where I do give those instructions. That was the last place that we stopped before we stopped at North Tonawanda on this trip. The two brakemen on the head end of the train would be the ones I would notify. I don't know personally which one I did speak to, or whether I spoke to both of them. I notified the engineer too. I know the location of those two cars at the time we left Lockport Junction, at that time they were the first and second car behind the engine. After
32 leaving Medina and before reaching North Tonawanda we made shifts in our train by taking cars out or putting in others. We left four cars after leaving Medina at Gasport. We took on five at Middleport. Left two at Lockport and picked up seven at Lockport. Our engine took water at Lockport. It is necessary to cut off our engine to do that, but sometimes it is avoided in different cases where you stop under the water column. I could not tell whether on this occasion we stopped under the water column or not. When we reached North Tonawanda there was a place

there to put cars that were destined for North Tonawanda to remain there, and cars that were destined for the Peanut Branch and the main line by way of Batavia. It is called Lockport Branch. That was parallel to the track that out train stopped on, the main line running to Buffalo. If that was blocked by cars the cars that were destined for Tonawanda were put into the other yard; that is the yard that is at the right of the main line of the Falls Branch Junction. They pull up on this same main track and back off in an angle into this yard. When we reached North Tonawanda I was in the caboose, making out my reports, getting ready for to turn them in at the end of my trip. I had already given the orders that these cars should be cut off. To get those cars from our train to the track I subsequently found them on after the accident occurred it was necessary to cut from the train behind the two cars that were to be left, and draw up over the switch. We ran up the main tracks, some distance, probably in the neighborhood of 5 or
33 6 car lengths, and then the switch was thrown and then the cars were backed in on this branch and left there, and the engine would proceed out and back onto the train. It was the duty of one of the brakemen, whichever one happened to be there, to throw the switch. Then the engine made the reverse movements and came back, and was attached to the train. Then our train drew up alongside of where the plaintiff was. When I first saw him he was at the eastward end of the cars which we left there. I saw those two cars that were formerly at the head of our train, the New York Central car and the Pennsylvania car that were spoken of. They were on the siding when our train drew up. It is known as the Lockport Branch. It is the long extension from just east of the Erie Tower. It was the siding that we put the cars on that were destined for the Peanut Branch and for the City of North Tonawanda. So that those two cars had been cut off from our train and were put in on that siding. There was a little erasure where I wrote "Batavia" I first started to write "North Tonawanda" because that was the place where we were to leave the car, and that place on the paper was where I was to write the destination, the final destination. North Tonawanda was as far as we drew the car. Then it went on another Branch to Batavia.

That is how I happened to start to write the words "North Tonawanda." I made a mistake there about the tonnage; then as to the "X," it looks as though it might be possible that when I
34 was checking up the next one I copied the "X" in the wrong place, and just erased it and put it where it belonged. On lots of occasions the tonnage isn't figured up for us. We get to figuring it up ourselves, and there might have been a mistake in that way. There was some error in my putting it down first, and I changed it to its proper figure. That was done there at the time.

Redirect examination by Mr. WARD:

Some of the New York Central cars have a weight which holds this dog up against the ratchet all the while, the modern ones. That is so quite generally with new cars. Whereas on this car, if the dog

once got out of the ratchet it had to be pushed back, or pushed up against it. It had to be retained there by the foot. There is no other car that I have come in contact with in the last five years that has that peculiarity, that the brake shaft works contrary to the air, besides this type of Pennsylvania car. The Pennsylvania Road is a line of railroads operating through the State of Pennsylvania with branches running into the State of New York. In the operation of our cars we find cars on our tracks from various railroads all over the United States.

Recross-examination by Mr. SPRATT:

The various roads have various arrangements of their own cars in their build and equipment. They are not all of the same kind. They have different kinds of brakes and different kinds of air. There is what they call New York air and the Westinghouse air, but practically they work the same. They have different kinds of
35 ratchets for brakes. On some brakes there is a spring or a weight and others there are not. Those that haven't springs or weights are very common. You find lots of cars in foreign equipment more than our own that have the foot ratchet, or the foot dog rather. We find quite a few Pennsylvania cars that are equipped with air in the same way that this car was; that turn in opposite directions. There are a great many of those in use. They are changing different appliances on the cars all the time, making different tests with different kinds of equipments; that a brakeman finds at all times in his experience. We handle on the New York Central on that run cars from all over the country from nearly all the roads of the country. We handled a great many Pennsylvania cars in that year.

JAMES O'BRIEN, called on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. WARD:

I am at present a New York Central brakeman. I was working for them at the time Carr got hurt. I was the head end brakeman on this train that he got hurt on. I rode generally on the engine, and Carr rode in the engine too. He assisted me. I told him what to do from time to time. When we got down toward North
36 Tonawanda we had orders to cut out a couple of cars at that place. We had two cars to leave, one of them was a Pennsylvania Line car, and the other, if I remember right, was a New York Central. It was a gondola. We picked the cars up at Medina. I had my orders from the conductor. At the time being we picked up the cars he said to me "Them cars are Tonawanda cars." So that I knew they were to be left at Tonawanda. They were put ahead of the other cars next to the engine. I do not remember what the destination of the car was just behind these two cars. When our train stopped on the main track at Tonawanda I went back and cut the two cars, the first two cars, off back of the engine. The train was

standing still at the time, and we pulled up over the switch; I opened the switch, and Mr. Carr jumped up to set the brakes, and I backed in—gave a signal, rather, to back in the two cars, and the engine backed in, and backed the two cars, and placed them on the siding, and he was setting the brake, and I turned the angle-cock back of the engine and reached over and — to turn the angle-cock on the car, but I didn't turn the angle-cock. I tried to do it. I used all the strength I had in my right arm to turn the angle-cock, but I couldn't turn the angle-cock and having streets tied up I reached over and broke the hose with my hand and uncoupled the engine, went out and run over the switch and coupled onto the train again,
and gave the signal to the engineer to go ahead, and the
37 engineer says to me "What is the man doing on the car?" I
says "I don't know." He seen a lantern up on the car. Then I walked back, and when I walked back going beside of the train found Mr. Carr laying between the tracks. I made an effort to pull the man up, but he was in agony and pain and I ran up to the engine and got on the engine and told the engineer I thought there was a man injured back there. The first thing I did when I was on the main track was to cut the connection between the second car back from the engine and the rest of the train, and in doing that I separated the coupling. And then I turned the angle-cock on each side of the hose connection, and then I uncoupled the hose. That left the air pressure on the cylinders on the two cars that were going to be moved. Those two cars were still hitched to the engine.

I told Carr to get up on a car and set a brake. It wasn't any particular brake that he was supposed to set. As long as you set the brake you know the car is secured. That is, it was one of the hand brakes. If I remember right he got up on the Pennsylvania car, the box car. He was up there when I gave the signal to start up the two cars. The engineer started to draw ahead over the switch. He had to run the length of two cars, a little better, maybe three cars. Then I turned the switch, so that he could back up from the track that he had just left onto a side track. I gave him the signal and he did that. Then I got the cars onto this side track. That was where
I wanted to get them. Then he stopped. Before we leave
38 cars on the side track like that it is the duty of the brakeman
to see that the hand brakes are set so that the car cannot run away or be blown by the wind or slide away. That was the part that Carr had to do. After the engine came onto this side track it came to a stop. It was after it came to a stop that I attempted to disconnect the engine from these two cars. The first thing I did was to shut off the air on the engine side of this connection. Then when I tried to shut off the air on the car side of this connection I was unable to turn the angle-cock. It was hard. I didn't seem to have strength to do it at that time. I was not able to do it. I tried to do it. I could not say what was the trouble with it. After I attempted to turn it, why I broke the hose with my hand. That has a tendency to setting the air brakes in emergency on the cars when you have not turned the angle-cock. That lets the air out. Letting the air out sets the brake. I have been a brakeman seven years, working for

the Central all that time. I have run across cars of this older type of Pennsylvania car where the brake handle will whirl around in the opposite direction when the air is let out. When the air is permitted to escape from such a car the brake-wheel will suddenly revolve in the opposite direction with considerable force. As a general thing with New York Central cars the ratchet, or dog, rather, that holds the brake-wheel, why, it sets under, so that it catches right underneath, and there is a little weight back here (indicating) that does the business. That holds it so it cannot spring back. This
39 older type of Pennsylvania car was not equipped with any such device as that to my knowledge. I have never seen any. I never told Mr. Carr that that older type of Pennsylvania car would do that if the air was suddenly let out.

Q. Were there any general instructions given to you, or any of the other men to your knowledge, to that effect?

A. No, sir.

Mr. SPRATT: I object to that, as incompetent, irrelevant and immaterial.

The COURT: I will let it stand.

Mr. SPRATT: Exception.

Neither I nor any other person made any examination of that angle-cock that I found that I could not turn before that car was put in the train, not to my knowledge. I couldn't say whether that angle-cock was opened or closed at the time the car was attached to the train. Those angle-cocks are supposed to be turned by hand.

Q. And did you use the usual amount of strength in attempting to turn it on that occasion that is ordinarily used in such work?

Mr. SPRATT: I object as speculative and incompetent.

A. Yes sir, I used all the strength I had.

The COURT: He may answer.

Mr. SPRATT: Exception.

After I broke the hose by hand I did not notice anything about this train, these two cars. I didn't see Carr fall off. I should judge it was about 10 or 12 minutes after the hose was pulled before I discovered what had happened to Carr. This upright brake on the Pennsylvania car was on the end of the car furthest away.
40 He was two car lengths from where I was. I got on the engine and the engine then went back to the next track and backed on the main track and coupled onto the train. It was after we had started the main train I discovered that Carr was gone. Mr. Walzer, the engineer, attracted my attention to the lantern being on the car and wondered why it was, and I went back and found the man between the tracks. He was conscious. I made an effort to pick him up, and he was in pain, and of course I see what—he had been hurt. Why, then I jumped the train and went over to the engineer and told him to stop and come back with me, we had injured a man. I didn't know how bad we had injured him.

The top of one of those box-cars above the ground is, I should

judge, 15 or 20 feet. I couldn't exactly say. Maybe 15 or 20 feet, 16 feet, something like that. I made no examination of that car afterward; either of those cars. The car that had this angle-cock which I was unable to turn was a New York Central car, the car next to the engine. This Pennsylvania car where this brake operated in the reverse direction, that was the second car from the engine. There was an air connection between those two cars all the time. When the air escaped on account of my not being able to turn this angle-cock it would come out from both cars. If I had been able to turn that angle-cock before I broke the connection then the air would not have escaped from those two cylinders.

41 Cross-examination by Mr. SPRATT:

There was an angle-cock at the other end of the New York Central car; or if I had gone to the end of the Pennsylvania car that Pennsylvania car. Carr went up on the Pennsylvania car to set the brake. If I had gone to the other end of the New York Central car and if the angle-cock had worked there and I had shut it off there, then the breaking of the hose between the engine and the New York Central car would have had no effect on the New York Central car; or if I had gone to the end of the Pennsylvania car that was next to the New York Central car and shut the angle-cock off there, then the breaking of the hose would have had no effect on the Pennsylvania car. After I discovered that the angle-cock did not work on the end of the New York Central car that was next to the engine, I had two other places that I could have gone and shut off the air so that the Pennsylvania car that he was on would not have been affected. There were two angle-cocks that could be turned. I could have shut off either one of them. Then the breaking of the hose between the New York Central car and the engine would have no effect on the Pennsylvania car.

Mr. SPRATT: I show the witness piece of hose.

Q. And ask you what this is? (Showing air hose to witness).

A. That is an air hose, and at one end is where the coupling is made with the air; and at the other end is the part where
42 the angle-cock is. And this upper end where the angle-cock is screwed into the iron pipe, that is in the car at the foremost part of the air-brake service.

It was that kind of an apparatus that was on this car. This is what I refer to as angle-cock (indicating). That is a piece of iron about 7 or 8 inches long. And when this is turned so that it is parallel with the hose, and with the iron, then the air is on. The air is in working condition. And when you shut it off so that the handle or that the angle-iron, or the angle-cock, is at right angles to the hose and to the iron, then the air is shut off.

(Air hose referred to received in evidence and marked "Exhibit 1.")

Mr. Spratt shows Exhibit 1 to the jury.

When I went there and tried to move it it was in that location,

so that the angle-cock, or the handle of it, laid parallel with the hose (illustrating). First I turned off the angle-cock that was on the engine. And then between me and the angle-cock that was on the New York Central car were the bumpers, and the coupling. So that when I tried to move it to, turn it, I had to reach over the bumpers and over the couplings to do that. I did not get over on the other side of the car and attempt to move it. That worked hard. I was right next to the engine. On the engine they have tools and appliances. I could have got a hammer from the engineer, or got the engineer himself to come there and fix it. This is not the first time in my experience that I ever knew of an angle-cock being stuck. Occasionally it occurs in severe cold weather, some-
43 times they freeze. It was a kind of a severe cold night. It was quite a cold night at the time. At times they get stuck with the cold weather. It has quite an effect on them. That is something that you cannot guard against, the cold weather or the freezing. I couldn't exactly explain how they freeze up. I know you take it in cold winter time, in severe weather, the angle-cocks, as a general thing they more or less turn hard. In the summer, why, they turn easy. And sometimes when they have got stuck you have got a hammer or a stone or something. I did not get a hammer or a stone or anything that night. It is a simple apparatus. On the occasions it has stuck I generally broke the air hose with my hand, and sometimes I have taken some kind of a hard substance, a hammer or so, if I could get it, and hammer them around there. That has happened quite a number of times in cold weather. When the air is applied it turns the wheel, the hand brake, in the opposite direction. What is called breaking the hose, that simply means uncoupling it. That is what I mean by that; the hose itself didn't break. There was nothing defective about that. When I say I broke the hose I mean I uncoupled the hose. If he had not been at the brake turning it at that time merely the uncoupling of the hose as I did it would be merely to cause the wheel to turn around, the brake-wheel. He happened to be turning the—setting the brake at the time of the—if I had told him that I was going to uncouple the hose and not go near it and not take hold of the brake-wheel until I had uncoupled, then the accident would
44 have been avoided. It was only because he happened to have hold of the wheel at that time that I broke or opened the hose that caused the wheel to turn.

I have seen a good many of the Pennsylvania cars equipped as this car was with reference to brakes. There are a good many of those cars of that type. As to whether there are thousands of them I couldn't exactly number them out. I could- -actly say whether there are about as many of those Pennsylvania cars that operate that way as operate any other way. There are other railroads besides the Pennsylvania that use the same kind of car, with brake equipments; so that brakeman has to look out for that. On that branch we handle cars from all over the country, from the railroads in different parts of the country.

With reference to the ratchets on the wheels, the brake-wheels

that I speak about, there are a great many of the cars that are equipped with weights or springs that govern the ratchet or dog, and there are a great many that are governed by the brakeman, by the foot. And the New York Central has some that have weights and others that are governed by your foot, and both types are common on all the cars that we have handled.

I have known the plaintiff in this case from the time that he started in as a brakeman with Mr. Stewart. He might have been in service a month or two weeks or three weeks, something like that. I wouldn't say. And on every trip we men on that
45 crew handled a great many cars. I should judge we would handle 75 to 80 cars a day, and we would take them to different stations along the route and leave others and some we took clear through to Buffalo.

If I remember right we picked these cars up at Medina. We picked them up right back of the engine. I am pretty sure we kept them there all the time. And when we got to North Tonawanda I and the plaintiff cut off these two cars. We were together, and we were on the main track at that time. And then we took these two cars and ran them up the main track some distance and then we threw the switch and they were put on a siding, and they were in on the siding at the time this accident occurred, wholly detached from the other train, and on a different track. The train had been parted. The balance of the cars of the train were destined for Buffalo and we took them there. All that I know is that this angle-cock worked hard. I couldn't explain what was the matter with it. There were brakes on the New York Central car, the gondola car, and he could have set the brakes on that car if he wished. The New York Central brakes turned in the same direction that the hand brakes turned. I am pretty sure the gondola car was New York Central. There were brakes at one end.

46 Redirect examination by Mr. WARD:

It is a comparatively common occurrence for these angle-cocks to stick in the wintertime, in severe weather. The weather has more or less the tendency to make it work hard. Sometimes you find one that sticks in the summertime, but not very often, I just exactly couldn't say if there was any tendency for water getting through these air hose or not. They are supposed to carry air.

Q. And if the weather has anything to do with it, is because water gets on them and they rust; they have to be looked after frequently to see that they are in proper condition, don't they?

A. Yes sir.

Nobody that I know of made any examination of this angle-cock before it was put in the train. It is a common practice when one of those angle-cocks sticks to break the hose just as I did. Where the angle-cock like that sticks there is, I think if I remember right, a rule or instruction that you should go and turn off the air at some other car.

Q. What was your general practice prior to this accident where an angle-cock sticks, when you are going to disconnect a train?

Mr. SPRATT: I object, as incompetent, irrelevant and immaterial and speculative.

The COURT: He may answer the question.

Mr. SPRATT: An exception. No proof to bind this defendant in any way.

The COURT: That may be.

47 A. I couldn't exactly say what the general practice has been. All I can say is at this time being that I broke the hose with my hand.

Q. Now, have you observed before that what other men did besides yourself under those circumstances employed by the defendant?

A. Well, I noticed other men did the same thing as I did.

Mr. SPRATT: I move to strike that out on the same grounds.

Q. Have you observed that to be what——

Mr. SPRATT: The objection applies, does it not, to that?

The COURT: Yes, it applies to that. It is received.

Mr. SPRATT: Exception.

I believe that there is something in the rules that says what you will do when you cannot turn the angle-cock and you have got to separate the train—that says you must go to some other angle-cock.

I can't exactly name other cars besides this old type of Pennsylvania car where the brake would jump in the reverse direction when the air was let out. I believe there is other cars that—in handling the Pennsylvania car I have noticed it frequently in that. I couldn't say exactly in regards to other cars. On that train that night there were five there marked "Pa. Company". Those others that I refer to; the cars that are marked "P. R. R." mean Philadelphia & Reading, I think, but I have nothing to do with the reports. That is out of my jurisdiction. We were ahead of a passenger train that night.

Mr. SPRATT: I ask that that be stricken out.

48 Q. On the time of the passenger train?

A. Yes, sir, pretty nearly on the time of the passenger train.

Mr. SPRATT: I object to that.

The COURT: I will let it stand.

Mr. SPRATT: Exception.

That is a single track road.

Recross-examination by Mr. SPRATT:

At the time I broke the hose the cars and the engine were standing still.

BERNARD J. CARR, plaintiff, called in his own behalf, and being duly sworn, testified as follows:

Direct examination by Mr. WARD:

I am the plaintiff in this suit. I am 33 years old. I was born at Valley Falls, New York, I first went to work for the New York Central September 16, 1909. Before that I worked in Schenectady on the street cars. I lived there four years and nine months. I was conductor.

Q. How much did you get?

Mr. SPRATT: I object to it, as incompetent, immaterial and irrelevant.

The COURT: Perhaps he may answer. I do not see how that has very much to do with it.

49 Mr. SPRATT: Exception.

A. Well, about 23, 21 to 23 dollars.

Before I went to work for the New York Central I had also worked for the Prudential Insurance Company at Schenectady, soliciting insurance; collecting the debit. I got a salary; $15.00, and then commission on all the insurance sold. I worked for the Prudential about a year and seven months. When I came to Rochester I worked five months on the street cars as conductor. That was just before I went to work for the Railroad Company. I also worked in a grocery store for my cousin at Schenectady for about two years and a half. I have been back there twice. That is about all I have done. I never had any experience in steam railroading when I went to work for the New York Central. I got my first job on the New York Central in Rochester. When I first went to work I was put at extra braking. I was on the extra work. I worked all the time, pretty near all the while. When I first went to work we went over the road. Just took a ride over the road and had the conductor sign our slip that we went over the main line and up the old road and down the Falls Road. After that I commenced to run as a brakeman. That was in September, 1909; so that I had been working for the company a little over a year at the time I was hurt. I was on that run from Rochester to Buffalo by way of Lockport about five weeks, had it regular for five weeks before I got hurt. I was under Mr. Stewart during that time, and part of my business was kick cars, put on brakes, turn switches. That is what a brakeman does. That train took

50 on and laid off cars all the way from Rochester to Buffalo. And some of those cars would be cars that would be left at various points in the state, and some of them would be cars going outside of the state. That was so practically all of our trip. On the day that I got hurt we left Rochester at 12.30. I was in good health at that time. I had not been crippled in any way. I had two good feet. The first that I knew of cars being set out at North Tonawanda was when my partner O'Brien gave me orders, told me they was going to leave two off for Tonawanda. O'Brien was not an extra man. He was a regular man. He gave me orders.

He said we should leave them off at Tonawanda on the siding. When the train got down to Tonawanda he cut off the two cars next to the engine. And he says "I will throw the switch and back in on the side and leave these two cars. You get up on top," he said, "and set a brake." I did that. I got up on the end car; the Pennsylvania. That is the one that he cut off from the other train. I was on the end toward the train. After I got up on there he backed in, we stopped, and I was putting on the brake. There is what you call a foot-board, and I had one foot on the foot-board and the other one on the car. I was in this position (illustrating). I judge that the wheel that turns the brake is about a foot and a half above the top of the car. I should judge this little step that I had my other foot on is about two feet below the top of the car. The dimension of that step is, I should judge, about three feet long, and about four or five inches wide. The brake beam goes down through the step, and a dog is on that step. You have
51 got to put that dog up with your foot (indicating). I had my left foot down on the step and my right foot up on the car. I turn that wheel around toward the right. That wheel is about a foot wide across the top, a foot and a half. It is an iron wheel with spokes in it, and you screw it up. The train was standing still while I was doing that. I couldn't say about how many turns I made before the accident happened. I was just going to give her one more notch as he snapped the air, and the wheel reversed the opposite way from what I was turning it. I was turning the wheel this way, (illustrating) and it reversed the opposite way, and away I went, and that is all I know. It went just like that (indicating by snapping fingers). Quick as lightning. It threw me from the top of the box-car to the ground, and when I landed I landed right on that right foot, on good hard cinder bottom. The top of the box-car was I should judge about 20 feet from the ground. I knew nothing about a peculiarity in certain Pennsylvania cars by which when the air was suddenly permitted to escape that this wheel would do what it did to me. I had never heard of that before. That was the first one I ever came in contact with that worked that way. In the year that I worked there I had handled more or less Pennsylvania cars.

Q. Is there anything about the car, the Pennsylvania car or its appearance, that would inform the ordinary railroad man that it would do this when the air was suddenly broken?

52 Mr. SPRATT: I object to that.

A. No sir.

Mr. SPRATT: As leading and suggestive.

A. No sir, unless he happens to see it.

The COURT: It is leading. I think he may answer.
Mr. SPRATT: Incompetent. Exception.

I don't know how far the brake-wheel jumped. I was stooping over when that thing happened about this way; in this condition (illustrating). Tightening up that brake-wheel, as you are in that

stooping position requires some strength or pull. The position in which I was standing at that time was no different from the position in which I usually stood in doing that work. That is the position in which I had observed other men stand.

Q. Did you receive any warning or instructions from the company concerning the presence or the possible presence in trains of cars equipped with this type of brake?

Mr. SPRATT: I object to that.

A. No sir.

Mr. SPRATT: As incompetent, irrelevant and immaterial; not pleaded or claimed.

The COURT: He may answer.

Mr. SPRATT: And it does not appear that there could be any duty requiring the giving of such instructions.

The COURT: We will take it for what it is worth. I think it is competent either on one phase or the other of the case. I will receive it at present and then we will discuss how far it may
53 be binding hereafter.

Mr. SPRATT: Exception.

Mr. SPRATT: Further he already stated that he did not know, and that is as far as he could go on that question.

Mr. WARD: Now, will you let me finish my question? Will you please read my question as far as I got?

Mr. SPRATT: I objected to the previous question. I simply want to amplify it.

The COURT: What was the previous question?

Mr. WARD: He did object to that and your Honor ruled on it. He noted his exception to your Honor's ruling.

The COURT: He wants to amplify his objection.

Mr. WARD: Oh, very well, I have no objection to his amplifying it.

Mr. SPRATT: And further that the questions that have been asked have no reference to anything further than the defendant's negligence, and that has not been pleaded, and the evidence is incompetent on that point.

The COURT: Whether it should be received for that purpose I will reserve. I will receive it on the other proposition, anyway.

Mr. SPRATT: I simply want to raise the point.

The COURT: Yes.

Mr. SPRATT: Exception.

54 I had never during the year that I worked there seen or known of any other car that when the air hose was broken and the air permitted to escape would suddenly jump the brake-handle in the reserve direction.

Q. And have you operated cars there, other cars besides this one, where the air connection was suddenly broken while you were turning on the hand brake, without any such damage or jerk as occurred in this accident?

Mr. SPRATT: I object, as incompetent, irrelevant and immaterial.

A. No sir.

The COURT: The same ruling.
Mr. SPRATT: And exception.

I never had the experience of turning an air-brake of any kind of car before where the air connection was severed so as to see whether or not it would jerk then. After I landed on the ground my partner, Mr. O'Brien, came back, and the engineer and fireman, and then O'Brien gave the engineer orders to pull his train ahead, and he would swing him up when the hind end got to me, and they carried me in the caboose, and took me to Buffalo, and waited there for the ambulance and I went to the hospital.

When I went to work for the New York Central I first went down the old Auburn Road to Syracuse. That was a pick-up freight. It stopped at all the local stations, and took on cars and left cars; and during that time I handled cars of different roads. I was on the Auburn Branch, off and on whenever I was called. I might
55 get a run to Auburn and the next day up this way. Soon after I commenced to run up on this Rochester-Lockport-Buffalo Line. I continued on this line more than any other. I held this run the longest of any run that I ever had. I commenced on that run about October, I think it was; the latter part of September, 1910. I ran pretty nearly every day from that time until the time I was hurt on this branch. The method of doing the work on that branch was no different from the method of doing work on the Auburn Branch. I do not remember of taking these two cars on at Medina. I don't know where these cars were. He always had charge of the head end. I didn't pay much attention. The next I knew about it was when we came to Tonawanda. O'Brien spoke to me then. We were running up on the engine together and he says "We have got two cars to leave off at Tonawanda". He told me they were the first two cars back of the engine. I had not gone over those cars in coming from Medina to North Tonawanda. I hadn't walked over them. Our train stopped on the main track. Mr. O'Brien uncoupled the two cars. He said "You get up on top and we will run them in on the siding." He says "I will throw the switch". So I climbed up on top and went to the rear end of the box car, the Pennsylvania, and he backed them up.

BERNARD J. CARR, plaintiff, re-called in his own behalf, testified as follows:

Cross-examination continued by Mr. SPRATT:

56 I rode on the cars from the time they were cut off until the accident happened. We drew up the main track about three or four car lengths, I should judge, before we stopped. Then Mr. O'Brien opened the switch, and let us in on the siding. Then we backed down maybe 4 or 5 car lengths, just so that our cars cleared the next track, the main track. I went to fasten the brakes on one of these cars. It is a rule to set the brake when you leave

cars at sidings so they do not run away. That is, so that the cars would not be moved by the wind, or by the grade, or anything like that. If the cars were coupled together, if you set the brake on one that is supposed to hold the two cars. So that I could have set the brake on either the New York Central car or the Pennsylvania car. The New York Central car was a gondola. I do not remember what it was loaded with. There were two brakes on the Pennsylvania car, one at either end. And I went to the brake that was farthest away from the engine, up on top. The foot board was not on top of the car. It was of the type where the foot board is below the top. That foot board is about three feet long and 6 inches wide, I should judge. When I took hold of the wheel I was facing east, away from the engine; had my back turned towards the engine, kind of sideways. I kept my foot on the foot board, and I put my right foot up on the top of the car. The foot board was about a foot and a half from the top of the car, something like that. And I was bracing myself with my foot against the car. That left my
57 body in an inclined position, just a little ways from the car. I was turning the wheel towards the right. Suddenly the wheel began to turn in the opposite way from what I was turning; so that it turned towards the left as I was turning toward the right. It came so quick I don't know how it felt after it started to turn. I can't tell nothing about it. During my experience of something over a year I handled a great many different kinds of cars, and I handled a great many Pennsylvania cars. I never had hold of a Pennsylvania car before when the air was applied as it was in this car; so that I don't know how the Pennsylvania cars worked under that condition. So that I do not say but what I handled a great many Pennsylvania cars that when the air was applied it worked in a reverse movement. They might have, but I never had that experience before. I merely say in that regard that I do not know but what I have handled a great many Pennsylvania cars that when the air might be applied to them would work in the opposite direction. I did not have knowledge of them. Mr. O'Brien came back to me there first. The engineer and fireman were with him. Mr. O'Brien came first. My partner stayed with me. The engineer and fireman got on the engine, and he gave them orders to go ahead, and he would flag them when the hind end got to me. And when the hind end came, why, then the conductor and hind brakeman came up and Mr. O'Brien told them that I was hurt. So they carried me into the caboose and took me to Buffalo, and waited for the ambulance and took me to the hospital.
58 At the time the accident occurred these two cars were cut off entirely from the balance of the cars in the train, and it was intended to leave them there at North Tonawanda, and we were to go on to Buffalo straight with the balance of the train of cars. I fell between the two tracks. That is where I found myself when I landed, on the side next to the train, next to the track that our engine was on.

JAMES O'BRIEN, re-called on behalf of the plaintiff, testified as follows:

I looked through the book. I fail to find a rule there in the book which says that you shall go to the next car.

HENRY W. STEWART, re-called on behalf of the plaintiff, testified as follows:

Direct examination by Mr. WARD:

"P. R. R." means Pennsylvania Railroad. "Pa. Company" means Pennsylvania Company. That is the way the cars, some of them are stenciled. Some of them are stenciled "Pennsylvania Lines." The majority of the cars that have the brake that jumps are of the Pennsylvania Company; it is the older series. I
59 haven't ever come across any other car of any kind that does that besides the Pennsylvania Company of late years. I am not in a position to say whether there was any other of those cars that made the action I have referred to on that train. There might be other cars in here, but there isn't any that I noticed that worked that way. There is no other Pennsylvania Company car in there. There are 4 "Pennsylvania Railroad." I have never found one of the new series that works reverse to the air. The cars marked "Pennsylvania Railroad" are what I call the new series. I do not know how old those box cars are. They have not a date on them.

Cross-examination by Mr. SPRATT:

The Pennsylvania Company and the Pennsylvania Lines are an old series. The P. R. R. are all later series, and seeing the stenciling and one thing and another, we take that for granted, because of late years they have been marking their cars "P. R. R.", and heretofore they were marked "Pennsylvania Company," and "Pennsylvania Lines." Of course I am not familiar with the road, only just as we handle their cars and see the changes. I couldn't state whether or not I have seen cars that were equipped as to the reversing action of the brake as this car was marked "P. R. R." and those marked "Pennsylvania Lines." I couldn't state whether or not I ever noticed any P. R. R. cars that way, because here of late I have been in other capacities where I am not handling freight, and being con-
60 ductor I don't very often have that duty to perform; the trainmen handle those cars.

Plaintiff rests.

(Adjourned until tomorrow morning at 10 o'clock).

Motion to strike out testimony.

Motion for non-suit.

Proceedings Tuesday Morning, June 25th, 1912.

Mr. SPRATT: If the court please, before the plaintiff rests I want to move to strike out the testimony which your Honor admitted and took under consideration subject afterwards to a motion to

strike it out, with reference to what he had seen other men do, or what the custom was upon coupling the hose and turning the angle-cocks.

The COURT: It may remain in as bearing upon the question of contributory negligence and that only.

Mr. SPRATT: Give me an exception.

I move for a non-suit, First. Upon the ground that no negligence has been shown to charge the defendant.

Second. Upon the ground that the plaintiff has failed to establish a cause of action against the defendant.

Third. Upon the ground that the proof shows that the plaintiff was guilty of negligence which caused or contributed to causing the accident.

61 Fourth. Upon the ground that the plaintiff has failed to establish the cause of action set forth in the complaint, or any cause of action against the defendant.

Fifth. In the further ground that no cause of action has been made out at common law.

Sixth. Upon the further ground that no cause of action has been made out under the Federal Employer's Act.

Seventh. On the further ground that the court has no jurisdiction of any cause of action under the Federal Employer's Liability Act, because the accident did not happen while the plaintiff and defendant were engaged in interstate commerce.

Eighth. Upon the further ground that no cause of action has been made out under the Barnes Act, so-called.

Ninth. On the further ground that no cause of action has been made out under the New York Employer's Liability Act.

The COURT: Before disposing of these motions I think I will hear all the evidence in this case and deny it for the time being, and then I will consider the matter.

Mr. SPRATT: An exception, please.

WILLIAM J. RYAN, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

62 I live at Eagle Harbor. I am the station agent there of the New York Central. I was station agent there in 1910. There are stone quarries whose business originates at Eagle Harbor. By my records I remember that in November, 1910, a gondola New York Central car, 72385, was sent out from my station. I keep a record of cars that leave my station. I do that personally. I have a record of that car. I make a record when the car arrives; when it is placed; when it is loaded, and when it goes forward. Also the train that goes forward, and keep a copy of the billing, shipping order, and so forth. My first record is (Referring to book) Car New York Central, 71385, empty, from Spencerport, on DLR-2, that is DLR-2 was the train, arrived the 14th in the night. It was placed the 16th at 9 A. M. and released the 17th at 2 P. M. By "placed" I mean placed in the Orleans County

Quarry Company's quarry for loading. By being released I mean the time the car was released by them. It was loaded with stone and went forward on the 17th with Engine 1817, stone for North Tonawanda. That was a switch engine that worked between Albion and Median at that time to take our cars to Medina, to be made up in a train there and this engine backed up the cars and took them to Medina and there they were put on the regular pick-up. This car was destined for North Tonawanda, New York. It was consigned to Mr. August Trouillie, Tonawanda, New York. I also have the original shipping order from the Orleans County
63 Quarry Company to Mr. Trouillie. "One car of stone, 71385, New York Central, signed by the Orleans County Quarry Company by the shipping clerk," Thomas MaGee. The date of that bill is the 16th. This book is a car record, a car register.

Mr. SPRATT: I read from the car register, that part of it which I wish to offer in evidence.

"New York Central G-O-M, 71385, empty, from Spencerport DLR-2, arrived 1:14 at night. Placed 16th at 9 A. M. Released 17th at 2 P. M. Loaded by Orleans County Quarry Company. Forwarded 11/17. November 17th, that is Engine 1817, loaded with stone for North Tonawanda, New York."

(Original shipping order referred to received in evidence and marked "Exhibit 2".)

My next record is our way-bill of the car, with a copy of the way-bill attached. It is dated November 17th, 1910. Way-bill No. 171, Car 71385, New York Central. Eagle Harbor, New York, to North Tonawanda, New York. Weigh this car at North Tonawanda. The consignor, Orleans County Quarry Company. Consignee, August Trouillie, North Tonawanda, New York. Articles, stone. Weight 40,000 pounds. Rate 45 cents ton. Charges $9.00. That has to be corrected, you see. It is weighed at Tonawanda and we put the total weight on. I can't give that here.

(Paper referred to received in evidence and marked "Exhibit 3.")

64 This car went forward at that date and at that time, to the best of my knowledge.

Cross-examination by Mr. WARD:

This car arrived the 14th of November. I am the person in charge there. I sent it to the quarry to be placed for loading on the 16th. It came back to me from the quarry on the 17th and then they sent it out. That is all I know about it.

ALBERT H. TUCKER, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at Medina. My business is with the Central Foundry Company. I was at the Central Foundry Company in November,

1910. (Referring to paper.) I remember of making a shipment in that month in Pennsylvania Car B, 576204, a box car. The shipment was soil pipe and fittings; the shipment was made or loaded on November 17th, 1910. It was consigned to H. J. Voltz, Batavia, New York. These are our records complete; a copy of the invoice, that is the original order, and that is a copy of the bill-of-lading. (Producing papers.) This bill-of-lading is dated November 17th, 1910. The Central Foundry Company was in the hands
65 of receivers at that time. Waddill C. Catchings was receiver of the Central Foundry Company. That is consigned to H. J. Voltz, Batavia, New York. The bill-of-lading is a copy of the original and a receipt by the Central Agent, J. H. Toohey.

(Paper referred to received in evidence and marked "Exhibit 4.")

This is an original order received from the customer.

(Paper referred to received in evidence and marked "Exhibit 5.")

This (referring to another paper) is a copy of the ooriginal invoice. This is what was shipped on that car.

(Paper referred to received in evidence and marked "Exhibit 6.")

The shipping clerk, Charles Haak, saw to the loading.

Cross-examination by Mr. WARD:

We shipped several cars that day. We did not ship one car to Pittsburg that day, that I remember of. I have no records here which show what other cars we shipped. All I know is that on that day we loaded or had loaded freight for Batavia on the car of this number. We did load a number of other cars; do every day; a good many of them designated for points outside of the State. This bill shows that this stuff weighed 8780 lbs. That is a little over 4 tons. That does not fill up a whole car. The average load that we put in a box car of that kind of
66 material depends on the capacity of the car they give us, from 5 to 15 tons. That shipment was not preferred freight.

CHARLES A. HAAK, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at Medina. I lived there in November, 1910. I was employed by the receiver at that time of the Central Foundry Company. I look after the shipping and did at that time. I remember making a shipment in Pennsylvania Car 576204. The bill-of-lading, or copy of shipping bill represents the shipment. That shipment was soil pipe and fittings. The date of shipment was November the 17th, 1910. Nothing else was put in the car besides that. Exhibit 4 represents that shipment. The cars are not shoved down to the foundry; there is a freight yard there about a half a

mile from the foundry and the freight is drawn there by teams, so that I do not know what day the car left but I do know that it was loaded on November 17th, 1910, and billed out.

67 EDWARD J. YAWMAN, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live in Medina, Orleans County, N. Y. I am in the employ of the New York Central there as yard-master. I was yard-master in November 1910. I keep a record of those cars going out. I remember of handling New York Central Gondola Car 71385 and Pennsylvania Box car 576204. I handled those cars on November 18, 1910. The New York Central Gondola car came from Eagle Harbor, New York; it reached Medina on the 17th. It left Medina on the 18th of November, 1910, on train RLB-3, the symbol number, extra 2484, Conductor Stewart.

It was loaded with stone for North Tonawanda.

Q. Who was the consignor and who was the consignee of that car?

Mr. WARD: Just a moment. We have got all that from the record by the bills. This man is only testifying to somebody else's records.

The COURT: I do not suppose there is any question about it.

Mr. WARD: I do not question it.

The COURT: That either of these two cars were loaded and shipped from the points in question destined to the points stated.

Mr. WARD: Yes.

Mr. SPRATT: Yes.

68 The COURT: That neither of them were carrying freight beyond the State.

Mr. SPRATT: No. I simply want to prove that beyond any cavil.

The COURT: I think it seems to be sufficiently established now. Unless there is some other proof given the court will deem that thoroughly established.

Mr. SPRATT: I think that is all.

I saw the Pennsylvania box car, too. That was loaded with soil pipe. I probably saw it in process of loading. There was nothing in that car except soil pipe and fittings. No one else put any in there in that car, excepting the receiver of the Central Foundry Company.

AUGUST TROUILLIE, called in behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at North Tonawanda, and am a teaming contractor. In 1910 I was engaged somewhat in the stone business, and in November I received a car load of stone from the Orleans Quarry Company, Eagle Harbor, New York, in New York Central Car Gondola 71385. That is the bill, (producing paper) from the New York Central,

and that is dated the 21st of November, 1910. And that
69 shows that the load of stone was received in New York Central car 71385.

(Paper referred to received in evidence and marked "Exhibit 7.")

I received the car at that time.

ROBERT ARRAS, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at Batavia. I am running an ice plant. In 1910 in the month of November I was driving a truck wagon. I did some work for Mr. H. J. Voltz.

(Counsel hands paper to witness, who examines same.)

That is my signature. I can't recollect whether I drawed that, or some of the other cartmen drawed it. I remember that I paid for it, because my signature is on it. That payment was for soil pipe and soil fittings, and that came in Pennsylvania Car 576204, consigned to H. J. Voltz from Medina. That was November 22, 1910. Those materials were taken from that car.

(Paper referred to received in evidence and marked "Exhibit 8.")

70 JOSEPH SNELL, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at North Tonawanda. My occupation is car inspector. I was car inspector in November, 1910, for the New York Central. I am on duty from 6:30 A. M. to 6:30 P. M. New York Central car gondola 71385 and Pennsylvania car 576204 came through the night and the night man inspected the car. I saw the car in the morning in the Peanut Branch, that is all I know of the car.

There are books kept of every car that leaves the station, books kept of every car *is* coming in crippled or defective. (Producing book). I personally did not inspect these two cars myself. James Carpenter was on duty at that time. He is not employed by the Company now.

JAMES A. CARPENTER, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I live at Niagara Falls, N. Y. At the present time I am working at carpentry. In 1910, in the month of November I worked
71 for the New York Central as car inspector at North Tonawanda. I quit working for the Central on the 8th day of February, 1912. When I worked at North Tonawanda in November, 1910, the hours that I was on duty were 6:30 P. M. to 6:30 A. M. I know this train, the pick-up train, from Rochester to Buf-

falo. It usually arrived at North Tonawanda anywheres from half-past seven to ten, eleven o'clock. They left cars that were destined for North Tonawanda or for the Peanut Branch on Siding Long Branch east of Oliver street I examined those cars. I examined New York Central Gondola 71385 and Pennsylvania box car 576204. That arrived there on the night of the 18th or the morning of the 19th of November, 1910. It was not over ten minutes after these cars arrived that I made my examination. I examined the running gear of the car and also the air appliances, and general equipment of the car, to see if it was in satisfactory condition to leave the yard, and I found the car O. K., in good condition. I found nothing out of order upon the air appliances. I found it all right; nothing wrong.

Cross-examination by Mr. WARD:

I did not hear that a man had got hurt there that night. I saw the train come in. At the time I made my examination the balance of the train had been gone about five minutes, and there was no report made to me that anybody had been injured on it. So that I did not have that in my mind when I made the examination of these two cars. And at the time I made the examination
72 I wouldn't say whether I tried the release valve to know whether there was any air on it or not.

FRANK E. CRAMER, called on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. SPRATT:

I was the rear brakeman on the train that Mr. Carr was injured on. When we drew up to Tonawanda while they were making this movement of the cars in on the siding I was located in the neighborhood of ten or twelve cars east of the caboose on the main track, back of the train, ten or twelve cars from the caboose. I was there to protect the rear end of the train. So that when we were making the movement there I was to stop another train coming up in the rear. I was back of the rear of the train some 10 or 12 cars.

Defendant rests.
Plaintiff rests.
Evidence closed.

Mr. SPRATT: If the court please, I now renew my motion for a non-suit.

(Recess until two o'clock.)

Afternoon Proceedings.

The COURT: Well, Gentlemen, this question which is raised in this case is not free from doubt as to whether it can be maintained
73 under the Federal Act. There seem to be conflicting decisions of the United States Court both ways. The question in the

Van Brimmer case, so far as the facts are concerned, are pretty square on all fours with these. On the other hand I have studied with a good deal of care the opinion of Judge Vandevanter in the Supreme Court, and if I can interpret that decision correctly it would seem to indicate the determination to make it apply to a case like this. Whether they intended it should or not I cannot say, and no one will know, I suppose, until he gets there, or some similar case is decided by the court, and I am going to, for the present, anyway submit the question to the jury whether Mr. O'Brien, the fellow workman, was guilty of any negligence on the occasion in question which caused the accident. Now, as to the other questions in the case which plaintiff's counsel thinks he has a right to submit to the jury under the Barnes Act, and under the common law and the Employer's Liability Act—and under other various State statutes, I cannot see how I can send it to the jury. Now, it is claimed that this angle-cock was out of order. Let us assume that it was, there were two angle-cocks that answered the same purpose if used, and Mr. O'Brien had ample knowledge of that fact. So that, when you have three instrumentalities, we will say, open to use, anyone of
74 which if in proper condition would answer the purpose and the person knows it, after testing one, knows that it does not meet the requirements, and he neglects to use the other, it does not seem to me that it can be said that the master, therefore, is liable because the one may be out of order, for he has furnished two others which would answer the purpose. Now, that *it* is the way it strikes my mind. I am just going to submit it for the present under the Federal Act, as to whether the defendant by reason of the alleged negligence of O'Brien, his fellow employee, was guilty of negligence under the provisions of that law. Now, your theory of course is that Mr. O'Brien negligently failed in his duty, and that if he had done his duty this thing would not have happened. Assuming, then, that he had done his duty, this accident would not have happened. Now, are they obliged to instruct against the negligence of some fellow employee? Is that so? I do not think so. That is the reason I am just going to hold you right down to that one thing.

Mr. WARD: Now, in order to protect myself on the record, I ask to go to the jury under the common law on the ground that the defendant failed to warn and instruct the plaintiff concerning the existence of this brake, and that the existence of that brake in the train was negligence unless the plaintiff was warned and instructed, and that the defendant failed to inspect its train, or the particular parts thereof prior to the accident.

75 Also on the ground that the defendant furnished a defective appliance which was a proximate cause of the injury.

The COURT: Well, I will dispose of it on the lines that I have indicated, and give you the exception, and I will give you the exception, too, Mr. Spratt.

Mr. SPRATT: I except to Your Honor's sending the case to the jury under the Federal Employers' Liability Act, on the grounds: First. That the act does not cover an accident happening as this

did while the plaintiff had desisted from interstate commerce and engaged in intrastate commerce.

Second. That if applied to these facts the Federal Act is unconstitutional.

(*a*) As a deprivation of property without due process of law.

(*b*) As an impairment of the rights reserved to the State.

(*c*) As in excess of the power of Congress under the commerce clause of the Constitution.

(*d*) As depriving the defendant of the equal protection of the laws.

Now, I move for a direction of a verdict on the grounds that I moved for a non-suit.

The COURT: I will give you the exception.

Mr. SPRATT: Yes, an exception.

And except on the same grounds that I recited in my exceptions on Your Honor's decision to submit to the jury.

76 *Charge of the Court.*

GENTLEMEN OF THE JURY:

It appears that the plaintiff was employed by the New York Central & Hudson River Railroad Company as a brakeman, was known as an extra brakeman, and on the day of the accident for which he seeks to recover occurred he was running on what is known as a pick-up freight train, which started at Rochester, took the branch of the defendant's road that ran to Lockport, and up to Tonawanda, and on to Buffalo, picking up and dropping off freight cars at different stations along the road. It appears that on the evening in question the train reached Tonawanda. In the train were two cars which it was necessary to set out upon a siding, one of them to go to Batavia and the other for some consignee living at Tonawanda. The two head brakemen knew that these two cars were to be set off there. It is testified that Mr. O'Brien, his associate, braking with the plaintiff in this action, told him about the necessity of setting these two cars out, leaving them upon the siding there, and O'Brien told the plaintiff to get on top of the box car and operate the hand brake when the time came while he himself cut out the two cars by cutting the coupling just behind the Pennsylvania box car, which was one of the two which he left at this station; that these two cars were just disconnected from the other portions of the train, and the locomotive hauled them ahead, then the switch was opened and they were backed back on to the switch. In order to leave them there of course it was necessary to disconnect
77 the engine from these two cars. As I understand the testimony of Mr. O'Brien he testifies it was customary in doing this to turn the angle-cock in connection with the air-brake system used on these cars, and then to disconnect the hose which connected one car with the other, and then run ahead; that he undertook to turn the angle-cock upon the gondola car, which was the car ahead of the one on which the plaintiff was, he at that time being on top

of the car, about, or endeavoring to set the hand brake, so that the cars that were left there would not move. Mr. O'Brien says that for some reason he was unable to move this angle-cock, and instead of going and turning the other two cocks which were available, one at the rear of the gondola and the other in front of the box car, it appears that he disconnected the hose connection of the air system. In the construction and operation of this air system of braking it appears that this disconnection operated to release the compressed air contained in the tanks under the car, and that set the brakes, and it so happened that setting the brakes on the Pennsylvania box car upon which the plaintiff was caused the wheel connected with the brake system which the plaintiff had hold of at the time to revolve in the opposite direction from which it usually revolves and this caused him to lose his footing, or his balance in some way, and he fell to the ground and sustained a fracture of the bone of the heel of his foot.

Now, that in brief is a history of the case and a recital of the conceded facts. There are very interesting questions of law involved in the disposition of this case which are addressed entirely
78 to the court, with which you have nothing to do. It is your province simply to pass upon the facts.

The plaintiff among other things claims the right to recover under an act of Congress passed several years ago changing what was commonly known as the common law rules of liability governing employers so far as the law applied to common carriers engaged in interstate commerce. The sum and substance of that act, and I need not read it to you in terms, provide that any employee of such a railroad company as the New York Central while engaged in interstate commerce shall have a cause of action against the railroad company where he sustains injury by reason of the negligence of anyone in the employ of the railroad company, or by reason of failure of the railroad company to furnish and supply suitable and proper machinery, cars, locomotives, and so forth, for the purpose of carrying on the business of transporting freight and passengers and doing the work incident thereto. So that heretofore in actions of this kind if the negligence was the negligence of a co-employee then the master did not become liable. Under the wording of the statute now the master, or the railroad company, becomes liable for the negligence of the fellow servant, of another employee, and it is the claim of the plaintiff in this case, among other things, that Mr. O'Brien, the associate brakeman of the plaintiff, was negligent in the thing that he did on the night in question, negligent in that he broke this connection between the engine and the gondola car without first setting the angle-cocks so that the compressed
79 air would not operate to set the brakes, and by that, what he did, he released the air in question so that the compressed air rushed out, set the brakes, caused this wheel to revolve in the manner that it did, and threw the plaintiff off onto the ground. Now, therefore, I submit to you as a question of fact for you to determine whether in doing what he did O'Brien was, in fact, negligent and caused the injury in question to the plaintiff. If O'Brien was

negligent in the operations which were performed there and it caused the injury to the plaintiff then the New York Central & Hudson River Railroad Company will have to respond for the injuries sustained; but it becomes a question of fact for you to determine under all the facts and circumstances of this case whether O'Brien was in fact negligent.

Now, negligence simply consists in doing or omitting to do what an ordinarily prudent man would have done under like circumstances for his own protection and the protection of others who may have relations or be connected with him in the common business or enterprise which they are engaged in. To apply the rule to this case, should O'Brien, as an ordinarily prudent man, have anticipated that the opening and breaking of this air connection in the manner that he did was likely to cause the thing to happen which did happen, and which resulted in throwing the plaintiff from the top of the car to the ground? Of course after things happen you may look back and see how they might have been prevented. A case of negligence is not made out simply because an accident does happen, or people could see how it might have been prevented by doing otherwise than was done, but the test is in determining
80 whether it is a case of negligence or not whether a reasonably prudent man would have anticipated that what he did was likely to result in injury to another person. If he did, and he disregarded those common rules of prudence and care, then it is a case of negligence, and a case is made out.

Now, it is contended on the part of the plaintiff in addition to this that the brake was defective, or rather the angle-cock was defective on the car that was placed in the hands of this train crew for operating; that it was in bad and defective condition, and, therefore, the plaintiff ought to recover on that account. Of course possibly that may be true, that it was defective; that for some reason it did not operate; but there were two other angle-cocks, one at the rear of the gondola car and one in front of the box car, which, even assuming the one that could not be turned was defective, was still capable of being used, opened to be used, and known to O'Brien to be capable of being used, and he omitted to use it.

Now, I have taken this view of the case, that where there are plenty of appliances to be used and at the command of the employee which if properly used would have brought about a safe result, and the employee simply omits to avail himself of the mechanism at hand which would be ample, then the employer cannot be held responsible for the consequences of the charge of having furnished improper machinery. I might illustrate it by just a simple case: Supposing you hired a man to dig in your garden, and you had
81 three shovels, two of which were perfectly good, and the third bad, and they were placed in his hands and he saw fit to take the first and ignore the other two which he had at his service. I do not think that the master could be legally charged with having furnished improper machinery, just upon that theory. I will therefore say to you that you should eliminate from your consideration the mere question as to whether this particular angle-cock was in bad

condition or not as affecting the liability of the defendant, and turn your attention to the other question which I have submitted to you as to whether the conduct of O'Brien in not using the other cocks, or doing what he did do under the circumstances, was negligence on his part in view of all the facts and circumstances of the case. If it was, then the Railroad Company becomes liable for the damages which the plaintiff has sustained.

Now, the plaintiff in this case sues to recover for injuries under this Federal Employers' Liability Act. This act in question provides that although the employee is guilty of contributory negligence on his own part, such contributory negligence shall not preclude a recovery, but that the jury shall take into consideration the contributory negligence of the employee and reduce the amount of the verdict which he otherwise would be entitled to in proportion to the amount that his own negligence contributed to the accident. In this case, however, I am unable to discover that the plaintiff was guilty of any contributory negligence whatever on his part. I can-
82 not discover that there is anything in the evidence that warrants you in finding that he was guilty of any contributory negligence, so that if you should find that he is entitled to recover then I charge you that he is entitled to recover such damages as he has actually sustained by reason of his accident, and that involves of course compensation to him for the loss of time which he has necessarily suffered by reason of the injuries, reasonable compensation for the suffering which he has undergone and any impairment which he has sustained and will sustain by reason of the injuries which he has suffered. The amount of these things rests entirely in your own good judgment. You cannot sit down and figure it up as you would computate the amount due on a promissory note, but it is a matter that you must determine for yourselves as reasonable, sensible men of affairs.

That is all I have to say Gentlemen of the Jury, in the disposition of this case.

Mr. PRATT: I understand that the only question Your Honor has left to the jury is the negligence of the trainman O'Brien.

The COURT: Yes.

Mr. SPRATT: Yes. I think Your Honor stated inadvertently that the wheel, the brake-wheel, revolved on this car in an unusual way.

The COURT: In what?

Mr. SPRATT: In an unusual manner. I think the court meant it reversed in a way different——

The COURT: I mean it went in the opposite direction from what it did on most cars.

83 Mr. SPRATT: From what it went when the hand brake——

The COURT: Yes.

Mr. SPRATT: Was used by the hand brake.

The COURT: Yes; that was all.

Mr. SPRATT: Yes.

I except to your Honor's charge, that part of your Honor's charge in which you say that if the jury find the brakeman O'Brien's negli-

gence caused the accident they can find a verdict against the defendant, and request your Honor to charge that if the jury find that the brakeman O'Brien caused the accident the verdict must be in favor of the defendant of no cause of action.

The COURT: That I decline, and give you an exception.

Mr. SPRATT: An exception to each.

I except to that portion of your Honor's charge in which you say that there is no proof that the plaintiff himself was guilty of contributory negligence, and ask your Honor to direct the jury that they may consider the fact of the term of his employment by the defendant and his opportunities of ascertaining the kind and type of cars that were in use on the New York Central Railroad, either owned by it, or by other companies; and I also ask your Honor to charge the jury that it was his duty to acquaint himself with the different types, and if they find that he was negligent in that respect then he is guilty of negligence which contributed to the accident, and which would prevent any recovery in the case.

The COURT: Of course generally speaking it is the duty of Employees to acquaint themselves with the operations of cars. A brakeman, I suppose, is under that duty and obligation. While the evi-
dence shows that these Pennsylvania cars came more or less
84 frequently into the trains, it does not appear that the exigency which arose in this case ever before was brought to the plaintiff's attention in any way, and he testifies that he did not know it. If he testifies truly in that respect, why, that ends that contention. Of course if he did know, why, then it would be a question for them whether he was guilty of any negligence or not about the car.

Mr. SPRATT: My point is that it was his duty to know the different types of cars that he would be required to handle, and in that duty he should have posted himself.

The COURT: I will decline it, and give you the exception.

Mr. SPRATT: That is all.

The COURT: Gentlemen you may retire.

(The jury thereupon retired to deliberate upon their verdict.)

(Adjourned until tomorrow morning at 10 o'clock.)

Proceedings Wednesday morning, July 25th, 1912.

(The jury returned into court with a sealed verdict in favor of the plaintiff and against the defendant in the sum of $3,500.00.)

(Defendant moves for a new trial. Motion entertained, to be argued some time next week.)

85 *Judgment.*

Supreme Court, Erie County.

BERNARD J. CARR
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

The issues in the above entitled action having come on for a trial at a Trial Term of the Supreme Court, Part II, at the City and

County Hall in the City of Buffalo, N. Y., in and for the County of Erie, on the 24th day of June, 1912, before the Hon. Charles B. Wheeler and a jury, and the jury having, on the 26th day of June, 1912, rendered and reported a verdict in favor of the plaintiff, and against the defendant herein, for the sum of $3,500.00, and said verdict having been reported to the court, and entered in the minutes of the Clerk thereof,

Now, on motion of Hamilton Ward, attorney for the plaintiff,

It is hereby adjudged by the court that the plaintiff herein, Bernard J. Carr, recover of the defendant, New York Central and Hudson River Railroad Company, the sum of $3,500.00, so found by said jury, together with the sum of $115.51, costs and dis-
86 bursements in this action, amounting in all to the sum of $3,615.51 and that the plaintiff have execution against said defendant thereof.

Judgment signed this 15th day of July, 1912.

C. W. CHAPIN,
Dep. Clerk.

SIR: Please take Notice that a judgment of which the within is a true copy this day — entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., July 15, 1912.

Yours etc.,

HAMILTON WARD,
Attorney for Plaintiff.

Office and Post Office Address, Rooms 7 and 8, Erie County Savings Bank Building, Buffalo, N. Y.

To Hoyt & Spratt, Attorneys for Defendant.

87 *Order Denying Motion for New Trial.*

At a Trial Term of the Supreme Court Held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 26th Day of June, 1912.

Present: Hon. Charles B. Wheeler, Justice Presiding.

Supreme Court, Erie County.

BERNARD J. CARR
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

The above entitled case having been tried at a Trial Term of this court, in Part II thereof, before the Hon. Charles B. Wheeler and a jury, and a verdict having been rendered therein on the 26th day of June, 1912, in the sum of thirty-five hundred dollars ($3,500.00) in favor of the plaintiff, and against the defendant, and a motion having been made by the attorneys for the defendant herein, for a

new trial, upon the minutes of the judge who presided at said trial, upon all the grounds specified in Exhibit A attached hereto, and the court having entertained said motion; Alfred L. Becker, Esq., appearing for the defendant herein for said motion, and the
88 plaintiff appearing by Hamilton Ward, his attorney, in opposition thereto, and after due deliberation,

It is ordered that the said motion for a new trial be, and the same hereby is denied, and that the defendant may have a stay of thirty days of all proceedings after entry and service of judgment.

CHARLES B. WHEELER, *J. S. C.*

Granted, July 15.

G. V. LAUGHLIN,
Sp. Dep. Clerk.

88*a* "EXHIBIT A."

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The defendant moves to set aside the verdict, and moves for a new trial upon

I. All the grounds stated in the motion for a nonsuit.

II. All the grounds stated in the motion for the direction of a verdict.

III. All the grounds mentioned in Section 999 of the Code.

IV. The ground that the verdict is for excessive damages.

V. The ground that the verdict is contrary to the evidence.

VI. The ground that the verdict is against the weight of the evidence.

VII. The ground that the verdict is contrary to law.

VIII. The ground that the court erred in submitting to the jury the question of Brakeman O'Brien's negligence.

IX. The ground that the court erred in submitting to the jury the question of Brakeman O'Brien's negligence,

88*b* (*a*) Because the interpretation of the Federal Employer's Liability Act under which the court submitted the question is unconstitutional since

(1) The Act if so construed would apply to commerce wholly intrastate, and

(2) The Act by its wording is indivisible, and

(3) The Act if so construed would violate the United States Constitution, Article 1, §8, Amendments V, VII, X and XIV.

(*b*) Because if the interpretation of the Act under which the court submitted the question to the jury is correct the Act itself is unconstitutional, since

(1) The Act if so construed would apply to commerce wholly intrastate, and

(2) The Act by its wording is indivisible, and
(3) The Act if so construed would violate the United States Constitution, Article 1, §8, Amendments V, VII, X and XIV.

Opinion.

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

Motion by the Defendant for a New Trial After a Verdict by a Jury.

Alfred L. Becker, for motion.
Hamilton Ward, opposed.

WHEELER, *J.:*

The plaintiff was a brakeman in the employ of the defend-
89 ant, and one of the crew on what is known as "Pickup train No. 181," running between Rochester and Buffalo, via Lockport and Tonawanda. This train took on cars at various stations along the way, and also dropped off cars destined for local intermediate stations.

When this train reached the village of Tonawanda, N .Y., there were in the train quite a number of cars loaded with freight, destined and consigned to points outside the State of New York. In other words, the train was engaged in both interstate and intrastate commerce. In the train was New York Central gondola car No. 71385, loaded with freight and billed to North Tonawanda, and Pennsylvania box car No. 576204, loaded with freight, and billed to Batavia, N. Y. Both of these cars had been loaded and shipped from Medina, N. Y. Orders were given the train crew to cut these two cars out of the train at North Tonawanda, N. Y., and place them on the siding at that point; the gondola car to be there unloaded by the consignee, and the Pennsylvania box car to be sent on from there to Batavia by the so-called "Peanut" branch of the defendant's road.

These two cars were in the train next to the engine. On arriving at North Tonawanda a cut was made in the train, and the engine hauled the two cars ahead and then backed them down upon the siding where the cars were to be left. The plaintiff was directed to climb to the top of the Pennsylvania box car and set the hand brake, so that the car would not move after being placed on the siding. He was engaged in doing this when his fellow
90 brakeman uncoupled the compressed air hose connecting the two cars with the engine, without first turning the angle-cocks connected with the compressed air brake system in use. The effect of his so doing was to release the compressed air in the tanks

under the car, and to set the brakes, and at the same time cause the wheel used by the brakeman to set the brake by hand, to rapidly revolve. In this instance, not only did the brake-wheel rapidly revolve, but it revolved in the opposite direction from those on cars in common use. As the plaintiff at the moment was on top of the box car turning the brake-wheel, the sudden reverse motion operated to throw him from the car, and in falling he broke the heel bone of his foot, more or less seriously injuring him.

It appeared that the proper and usual practice is to turn the angle-cocks in question before attempting to uncouple the hose connections, and the plaintiff charged that the fellow brakeman of the plaintiff was guilty of negligence in doing what he did, and that under the Federal Employers' Liability Act, the negligence of the fellow brakeman is to be deemed the negligence of the railroad, and — it liable for the injuries received. The case was submitted to the jury upon that theory, and the jury was instructed by the court that if they found the fellow brakeman in fact negligent, as claimed, then the plaintiff was entitled to recover.

The defendant contended on the trial, and now contends on this motion, that the plaintiff at the time of the accident was not
91 engaged in interstate commerce, but was doing things wholly relating to intrastate commerce, and that the Federal Employers' Liability Act has no application to the facts developed on the trial of this action, and above recited. The defendant argues that at the time of the accident to the plaintiff, he and his associates were engaged in placing on the siding at Tonawanda cars shipped from points within the state to other points within the state, which in no sense constituted interstate commerce, and that therefore the Federal act cannot apply, but the defendant's liability is to be governed by the rules of the common law, and inasmuch as, under the rules of common law, the accident was caused by the negligence of a fellow servant, there can be no recovery in this action.

The jury rendered a verdict for the plaintiff, and the defendant now moves to set the verdict aside, and for a new trial upon the law and the facts.

We thus have presented for our consideration the very interesting question of law as to whether or not the plaintiff is entitled to the benefit of the provisions of the Federal statute. The present act of Congress is as follows:

"An Act relating to the liability of common carriers by railroad to their employes in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That
92 every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to

his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." * * *

For the purpose of this case, it is unnecessary to quote anything beyond the first section as given above. It abolishes the fellow servant doctrine in negligence cases, and makes the carriers liable for the negligence of its employees where other employees are killed or injured. The constitutionality of the act has been sustained by the Supreme Court of the United States in what is known as the "Second Employers' Liability Cases," (Mondou v. N. Y., N. H. & H. R. R. Co. and other cases), 223 U. S., 1.

The Supreme Court, however, has not decided the ques-
93 tion here presented, as to whether the Federal Act applies to a case like the one in hand. We have, however, conflicting views and decisions of the lower United States Courts expressing diametrically different views and conclusions on the questions before the court in this case. The widely divergent view entertained by the lower courts is illustrated on the one hand by the case of Van Brimmer v. Texas & Pacific R. R. Co., 190 Fed. Rep. 399; and on the other hand by that of Behrens v. Illinois Central R. R. Co., 192 Fed. Rep., 581.

In the Van Brimmer case, the facts were substantially the same as these in the case now under consideration, and the court held that in setting out cars loaded with freight shipped from one point in a state to another point in the same state, a train crew were "engaging" in an act in furtherance of the purely domestic and intrastate commerce of the defendant. That being so, the provisions of the Act of Congress known as the "Employers' Liability Act" do not apply.

On the other hand, in the Behrens case, a fireman of one of the defendant's switch engines was killed while working on an intrastate train, although a good share of the time engaged in interstate commerce. The action was brought solely under the Federal Employers' Liability Act. He was a member of a switching crew, who reported for duty at a suburb of New Orleans, made up a train of
empties intended for various destinations, and hauled these
94 empties to another point near New Orleans, and from the second point hauled another train back to the starting point. At the time of the accident, all of the cars of the train had originated at and were destined to points in the state. The court held that the employee killed was protected by the provisions of the Federal Act. The court said:

"I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his

status and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations, they are so blended as to be inseparable, and where the employee, himself, has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

In the case of Zikes v. The Oregon R. & M. Co., 179 Fed. Rep. 893, decided in the Circuit Court for the Eastern District of Washington, the court went to the extent of holding that a section workman, working under the direction of a section boss, who was injured by the head of a spike flying off and striking him while he was attempting to drive a spike in a tie under the rails of a railroad, was engaged in interstate commerce, because while the tracks were used in intrastate commerce, they were also used in
95 interstate commerce, and the act of the workman was necessary to that commerce.

While interesting, it is probably unprofitable to cite further cases illustrating the divergent views of the courts as to the extent and limitations of the Federal Employers' Liability statute in its application to the varying combination- of circumstances which may present themselves for adjudication. In the absence of any controlling decisions of the courts of this state, and in view of the conflict of opinion in the United States courts we feel at liberty to investigate the questions here presented de novo, and reach such conclusions as best we can on the merits of the case.

It is conceded that the train and crew of the defendant in this case, while hauling the train from Rochester to Buffalo, were engaged in interstate commerce. Can it fairly be said that during the ten or twenty minutes they were engaged in cutting out the two cars in question and placing them on the siding at Tonawanda, they ceased to be so engaged? May it not be fairly argued that the placing of these cars on the siding was simply an incident to the operation of the entire train engaged in interstate commerce Can it be distinguished in principle from the attaching of those cars to the train at the local station by the crew; and can it be successfully argued that when men, engaged in operating an interstate train for the convenience of the railroad, take onto such a train interstate cars, they cease to be for that particular act interstate commerce agents? Is not the sounder and wiser view to regard such a train crew as retaining all the time, even when performing isolated
96 acts relating to intrastate commerce, the legal relationship of men engaged in moving interstate commerce and entitled to the protection of the federal statute?

We are of the opinion that the recent decision of the United States Supreme Court, in the Second Employers' Liability Cases, 223 U. S., 1, sustain this view. Justice Van Deventer, speaking for the court, in his opinion said, in reference to the act and the power of congress to legislate on the subject of interstate commerce:

"This power over commerce among the states so conferred upon

congress, is complete in itself, extends incidentally to every instrument and agent, by which said commerce is carried on may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce." (Page 47).

Later in his opinion the learned justice, discussing the constitutionality of the act, says:

"The second objection proceeds upon the theory that even although congress has power to regulate the liability of a carrier for injuries sustained by one employe through the negligence of another, where all are engaged in interstate commerce that power does not embrace instances where the negligent employe is engaged in intrastate commerce. But this is a mistaken theory, in that it
97 treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of Congressional power. As was said in Southern Railway Co. v. United States, 222 U. S., 20-27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the sources of the danger which threaten it. The present act, unlike the one condemned in Employers' Liability Cases, 207 U. S., 463 deals only with the liability of a carrier in interstate commerce for injuries sustained by the employes while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the casual negligence is that of an employe engaged in intrastate commerce; for such negligence when operating injuriously upon an employe, engaged in interstate commerce, has the same effect upon that commerce as if the negligent employe were engaged therein."

In the case of Southern Railway Company v. United States, 222 U. S. 20-27, the Supreme Court held that the Safety Appliance Act of March 2, 1893, embraced all locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce, and, therefore, where interstate and intrastate commerce are commingled in transportation over highways of interstate commerce that trains and cars on the same railroad, whether engaged in one form of traffic or the other are interdependent, and that absence of safety appliances from any part of a train is a
98 menace not only to that train but others. The court, therefore, upheld a conviction of a railroad for failure to comply with the safety appliance act of Congress, although the case on which the appliance was absent were cars engaged solely in intrastate commerce, but placed in a train also moving interstate commerce cars.

These two cases so recently decided by the Supreme Court clearly indicate that the court in applying these acts is disposed to give them the broadest construction. The court also lays down certain principles which, when applied to the facts of this case, are, in our opinion, decisive of it.

If we assume that the immediate act of placing the two cars on the siding at Tonawanda was not an act of interstate commerce, nevertheless that fact or circumstance the Supreme Court says is not controlling in determining the liability of the defendant under the Federal statute. The fact that the negligent employe is engaged in intrastate commerce at the time does not control but as the court said it is "the effect of the injury upon interstate commerce" which is the criterion of Congressional power to legislate on the subject.

The defendant the New York Central & Hudson River Railroad Company was engaged generally in interstate commerce. This particular train was engaged in such commerce. The plaintiff and his fellow brakeman were engaged in interstate commerce when manning this train. Assuming they were doing intrastate com-
99 merce duties while placing the two cars in question, they still remained all the time in the employ of the defendant, and in charge of the operation of the interstate commerce train from which the two cars in question were taken. While cutting out the cars in question at Tonawanda, they still continued their relationship to the rest of the train as interstate commerce agents. Placing the cars upon the siding was but incidental to their main employment. Any accident or injury to one or more of the crew, to that extent tended to un-man the train about to proceed in interstate commerce and to disable one or more of such a crew might impede and delay the progress of the train on its way, and affect its safety and dispatch. The safety of the plaintiff, as one of the trainmen charged with the movement of the remaining cars of the train, had an important bearing and direct relationship to the movement of interstate commerce, and his injuries and consequent inability to discharge his duties as brakeman on the train about to proceed, directly affected such commerce.

The case of Pedersen v. Del. Lack. & Western R. R. Co., recently decided by the U. S. Circuit Court of Appeals for the Third Circuit, holds substantially the same views, although the facts to which the law is applied in that case were very different and led to a different result.

We are of the opinion that these considerations make it quite clear that under the general doctrine laid down by the Supreme Court in the Second Employers' Liability Cases, the plaintiff in this case is entitled to the benefit of the Federal Act. That he
100 must be deemed to have been in the continuing employment of the defendant engaged in interstate commerce, and the defendant became liable for the negligence of O'Brien, his fellow brakeman.

For these reasons, the motion for a new trial is denied.

Let an order be entered accordingly.

Erie Trial Term,
Decided, July, 1912.

Notice of Appeal.

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

SIRS: You will please take notice, that the defendant, The New York Central and Hudson River Railroad Company, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of this court, entered in the
101 office of the Clerk of Erie County on the 15th day of July, 1912, in favor of the plaintiff and against the defendant, The New York Central and Hudson River Railroad Company, for the sum of three thousand five hundred ($3500.00) dollars damages, together with the sum of one hundred fifteen dollars and fifty-one cents ($115.51) costs, amounting in all to the sum of three thousand six hundred fifteen dollars and fifty-one cents ($3615.51) and from the whole and each and every part of said judgment.

And you will further take notice, that the defendant, The New York Central and Hudson River Railroad Company, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order, made at a Trial Term of this court on the 26th day of June, 1912, and entered in the office of the Clerk of the County of Erie, on the 15th day of July, 1912, denying the defendant's, The New York Central and Hudson River Railroad Company, motion for a new trial, and the defendant hereby appeals from the whole and each and every part of said order.

HOYT & SPRATT,
Attorneys for Defendant.

77 West Eagle Street, Buffalo, N. Y.

To John H. Price, Esq., County Clerk, Erie Co.; Hamilton Ward, Esq., Attorney for Plaintiff.

102 *Stipulation.*

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

It is hereby stipulated, by and between the attorneys for the respective parties to the above entitled action that the foregoing copies of the Proceedings, Case Containing Exceptions, Clerk's Minutes, Judgment, Order Denying Motion for a New Trial, Opinion

of Trial Justice, Notice of Appeal to the Appellate Division and all other papers and documents in said case contained are true and correct transcripts of and from the originals, now on file in the office of the Clerk of Erie County and the same may stand on this appeal with the same force and effect as if certified by the clerk of said county.

And it is further stipulated, that any and all of the plaintiff's exhibits herein, whether printed in the record and made a part hereof or not, may be produced and used upon the argument of this appeal, and that all of the exhibits may be produced and used upon
103 the argument of this appeal with the same force and effect as if fully set forth in the printed case on appeal herein.

Dated, Buffalo, N. Y., September 9th, 1912.

HAMILTON WARD,
Attorney for Plaintiff-Respondent.
HOYT & SPRATT,
Attorneys for Defendant-Appellant.

(Here follows Exhibit C, marked pages 104 and 105.)

EXHIBIT C.

Exhibit C.
Irving P. Cragin,
Stenographer.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD.

Report of Freight and other cars. WESTWARD. *Date, Nov. 18, 1910.*

From Rochester to E. Bflo. via Falls R.

No.	Road Initials.	Numbers Loaded.	Numbers Empty.	Where Taken.	Where Left.	P	F	X	Weight in Tons Contents.	Car.	Destination.
1	N. Y. C. & H.		3046	R	B					20	
2	"		85420	"	R27					18	Fancher
3	"		85558	"	"					18	"
4	"		71733	"	"					17	"
5	G. T.	39017		"	R32				28	16	Albion
6	M. K. & T.	13672		"	"				36	17	"
7	N. Y. C. & H.		40891	"	R38					21	Knowlesville
8	"		40815	"	"					21	"
9	"		110436	"	R52					22	Gasport
10	"		110287	"	"					22	"
11	"		110239	"	R42					22	Medina
12	"		40685	"	"					21	"
13	"		40696	"	"					21	"
14	"		40741	"	"					21	"
15	"		40431	"	"					21	"
16	W. & V.		28789	"	"					17	"
17	N. Y. C. & H.		16043	"	"					14	"
18	L. E. & W.		6392	"	"					15	"
19	A. G. S.		8438	"	"					18	"
20	S. A. L.		16015	"	"					17	"
21	Big 4		8127	"	"					16	"
22	N. Y. C. & H.		60187	"	"					16	"
23	C. & N. J.		12973	"	"					20	"
24	P. R. R.	300015		"	R52				42	20	Gasport
25	Wab.	64522		"	"				32	16	"
26	N. Y. C. & H.		40590	"	R36					21	Eagle Harbor
27	"		40870	"	"					21	"
28	Big 4	10520		"	"				24	14	"
29	M. C.		33023	"	"					15	"
30	"		2386	"	"					11	"
31	N. Y. C. & H.		33450	"	"					15	"
32	"		33167	"	"					15	"
33	L. S. & M. S.		14059	"	"					12	"
34	N. Y. C. & H.		74530	"	"					16	"
35	Southern	16493		R12	B				19	16	O. St. Bflo.
36	B. & O.		79547	"	"					16	E. Bflo
37	M. C.		44954	"	"					18	"
38	B. & Me.	61046		R24	"				18	18	O. St. Bflo.
39	Wab.	65050		"	"				18	16	Cleveland
40	A. G. S.		13253	"	"					17	E. Bflo.
41	N. O. & N. E.	16406		R27	R32			x	10	16	Albion
42	C. & A.	17618		R42	R58				30	20	Lockport
43	N. Y. C. & H.	71385	[illegible]	"	B011				40	17	No. Tonawanda
44	Pa. Co.	576204		"	"				4	15	Batavia
45	N. Y. C. & H.	44484		"	B			x	21	15	Memphis
46	P. R. R.	18549		"	"			x	5	23	Pittsburg
47	V. R. R.	8794		"	"				40	15	Oakfield
48	B. & O.	116418		"	"				43	24	"
49	L. V.	82479		"	"				12	21	O. St. Bflo.
50	C. B. & Q.	38243		"	"			x	11	21	Indianapolis
51	C. & O.	5942		"	"			x	5	15	Collinwood
52	S. C.	773		"	"			x	5	16	E. Bflo.
53	M. S. P.&S. S. M.	102244		"	"			x	3	15	Jamestown
54	Q. C.	506		R47	"				4	15	C. S. T. Bflo.
55	M. D. T.	14939		"	"				12	21	E. Bflo.
56	C. B. & Q.	37758		"	"				12	21	"
57	C. P. R.	59234		"	"				30	18	O. St. Bflo.
58	M. C.	41426		"	R58				20	16	Lockport
59	P. R. R.	71838		R58	B				4	16	E. Bflo.
60	Wab.	64745		"	"				2	16	C. S. T. Bflo.
1	P. & L. E.	30199		R58	"				1	18	O. St. Bflo.
2	P. R. R.		211307	"	"					19	E. Bflo.
3	"		219956	"	"					19	"
4	Wab.	61900		"	"				3	15	O. St. Bflo.
5	F. G. E.	21274		"	"				13	18	Kankakee

or yardmaster is located, unless the cars are properly sealed.

Report must be made of all seals broken or applied in train, also imperfect or defective seals.

Weight of lading and light weight of car to be obtained from running slips or way-bills and weight of each noted in proper column under "Weight in Tons." Where the fractional part of a ton is less than 1,000 pounds it will not be shown, only the even ton being entered in the proper space. Where the fractional part of a ton is over 1,000 pounds it will be considered as one ton and so shown in proper column with even tons.

Cars having Preferred Freight card or wrapper protection will be marked X in column headed P. F.

Use the following initials to indicate kind of car: B-Box, H-Automobile, W-Furniture or Carriage, S-Single Deck Stock, D-Double Deck Stock, G-Gondola or Coal, F-Flat O-Oil Tank, R-Refrigerator, P-Palace Horse, CB-Coke or Bark Rack, C-Passenger Coach, A-Baggage, M-Mail, X-Express, DE-Dead Engine, K-Caboose.

Destination must be given for all cars, loaded or empty, as shown by Way-bill or Car Slips and NOT from Car Cards.

501

106 Supreme Court, Appellate Division, Fourth Department.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Alfred L. Becker, being duly sworn, deposes and says that he is an attorney at law associated with the firm of Hoyt & Spratt, attorneys for the defendant in the above entitled action. That he is the Counsel who argued the appeal before the Appellate Division, Fourth Department. That said Appellate Division, Fourth Department, which unanimously affirmed the judgment beflow, wrote no opinion as deponent is informed and verily believes.

ALFRED L. BECKER.

Subscribed and sworn to before me this 27 day of August, 1913.
H. W. HUNTINGTON,
Notary Public, Erie Co., N. Y.

107 [Endorsed:] Supreme Court, Appellate Division, Fourth Department. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Company, Defendant. Copy. Affidavit of no Opinion in Appellate Division. Hoyt & Spratt, Attorneys for Defendant. Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Filed Erie County, Clerk's Office, Aug. 29, 1913.

108 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 29th Day of April, 1913.

Present:

Honorable Frederick W. Kruse, Justice Presiding.
" James A. Robson,
" Nathaniel Foote,
" John S. Lambert,
Associate Justices.

BERNARD J. CARR, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

The above named, New York Central and Hudson River Railroad Company, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judg-

ment of the Supreme Court, entered in the office of the Clerk of the County of Erie on the 15th day of July, 1912, and from an order denying defendant's motion for a new trial entered in said Clerk's office on the said 15th day of July, 1912, and said appeal having been argued by Mr. Alfred L. Becker, of counsel for the appellant, and by Mr. Hamilton Ward, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered that the judgment and order so appealed from be and the same hereby are affirmd, with costs.

All concur, Merrell J., not sitting, and McLenna, P. J., having been present at the argument on said appeal, but having died on the 8th day of May, 1913, without having taken any part in the determination of this appeal.

NEWELL C. FULTON, *Clerk.*

Entered 11th day of June, 1913.

109 Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.:

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court, in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding, and of the whole thereof, and that the original case and papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Rochester, N. Y., this 11th day of June, 1913.

[SEAL.] NEWELL C. FULTON, *Clerk.*

110 SIR: Please take notice that an order of which the within is a true copy — this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated Buffalo, N. Y., June 16, 1913.

Yours, etc.,

HAMILTON WARD,
Attorney for Pl'ff, Resp't.

Office and Post Office Address, Rooms 7 and 8, Erie County Savings Bank Building, Buffalo, N. Y.

HOYT & SPRATT,
Att'y for Def't-App'l't.

[Endorsed:] Supreme Court, Appellate Division, Fourth Department. Bernard J. Carr, Respondent, vs. New York Central and Hudson River R. R. Co. Copy. Remittitur. Hamilton Ward, Attorney at Law, Rooms 7 and 8 Erie Co. Savings Bank Building, Buffalo, N. Y., Attorney for Plaintiff. Served on Mr. Parry of Hoyt & Spratt, Month June, Day of 17, Year 1913.

111 Supreme Court, Erie County.

BERNARD J. CARR
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

The appeal taken by the defendant from the judgment entered in the above entitled action in the office of the Clerk of the County of Erie on the 15th day of July, 1912, and from an order denying defendant's motion for a new trial entered in said clerk's office on the same day having been brought on for a hearing, and heard at the Appellate Division of the Supreme Court, Fourth Department at the City of Rochester, New York, at a term of said court beginning the 29th day of April, 1913, and an order of said Appellate Division having been made and entered on the 11th day of June, 1913, affirming said judgment with costs of said appeal to respondent, all of the justices concurring, Merrell J. not sitting:

Now, on Motion of Hamilton Ward, attorney for the respondent, it is

Adjudged that the said judgment be, and the same is, hereby, in all respects, affirmed, and that the respondent recover of the appellant the sum of one hundred eight and seventy-two hundredths (108.72) dollars, costs and disbursements of said appeal.

Judgment signed this 17 day of June, 1913.

C. W. CHAPIN,
Dep. Clerk.

112 SIR: Please take notice that a Judgment of which the within is a true copy — this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated Buffalo, N. Y., June 17, 1913.

Yours, etc.,

HAMILTON WARD,
Attorney for Pl'ff.

Office and Post Office Address, Rooms 7 and 8, Erie County Savings Bank Building, Buffalo, N. Y.

HOYT & SPRATT,
Att'ys for Def't.

113 [Endorsed:] Supreme Court, County of Erie. Bernard J. Carr, v. New York Central & Hudson River Railroad Company. Copy. Judgment. Hamilton Ward, Attorney at Law, Rooms 7 and 8 Erie Co. Savings Bank Building, Buffalo, N. Y., Attorney for Plaintiff. Served on Mr. Parry, of Hoyt & Spratt, Month June. Day 17, Year 1913. Filed Erie Co. Clerk's Office, June 17, 1913.

114 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, New York, Commencing on the 8th Day of July, 1913.

Present:

Hon. Frederick W. Kruse, Presiding Justice.
" James A. Robson,
" Nathaniel Foote,
" John S. Lambert,
" Edgar S. K. Merrell,
Associate Justices.

BERNARD J. CARR, Respondent,
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Appellant.

The above named New York Central & Hudson River Railroad Company, appellant herein, having, on the 8th day of July, 1913, duly moved before this court for an order granting to it leave to appeal to the Court of Appeals from the judgment of affirmance entered upon the order of affirmance heretofore and on the 11th day of June, 1913, duly made and entered herein.

Now, upon reading and filing the affidavit of Alfred L. Becker, verified the 2nd day of July, 1913, the notice of said motion, together with proof of due service thereof upon the attorney for respondent, and upon all the proceedings heretofore had and taken herein, and after hearing Mr. Alfred L. Becker, of counsel for appellant, in favor of the motion, and Mr. Hamilton Ward, of counsel for respondent, in opposition thereto, after due deliberation had thereon,

It is hereby ordered, That the said motion be, and the same hereby is, denied, with ten dollars costs.

NEWELL C. FULTON, *Clerk.*

Entered 8th day of July, 1913.

115 Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.:

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within order is a true copy of the original, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the city of Rochester, New York, this 8th day of July, 1913.

[SEAL.] NEWELL C. FULTON, *Clerk.*

116 & 117 [Endorsed:] Appellate Division, Supreme Court, Fourth Department, County of ——. Bernard J. Carr v. New York Central & Hudson River Railroad Company. Copy. Order Denying Motion for Leave to Appeal to the Court of Appeals. Hamilton Ward, Attorney at Law, Rooms 7 and 8 Erie Co. Savings Bank Building, Buffalo, N. Y., Attorney for Plaintiff, Bernard J. Carr. Phones: Bell, Seneca 503; Federal 1695. Due and personal service is hereby admitted of a copy of the within. Dated —— —, 191–. Rec'd by mail July 10, 1913. H. W. H., Att'y. Served on Hoyt & Spratt by mail, of Hoyt & Spratt, Month July, Day 10, Year 1913. Filed Erie Co. Clerk's Office, July 10, 1913.

118 Supreme Court, Erie County.

BERNARD J. CARR
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

In view of the fact that the only question involved is the interpretation of a federal statute, I think it would be as well to take the case directly to the United States Supreme Court, and, therefore, the application for leave to appeal to the Court of Appeals is denied.

W. H. CUDDEBACK,
Judge Ct. of Appeals.

119 [Endorsed:] Supreme Court, Erie County. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Company, Defendant. Copy. Opinion of Judge Cuddeback Denying Leave to Appeal to Court of Appeals. Hoyt & Spratt, Attorneys for Defendant, Office and Post Address: 77 West Eagle Street, Buffalo, New York. Filed Erie Co. Clerk's Office, Aug. 29, 1913.

120 Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

The above named defendant having applied to the undersigned, an Associate Judge of the Court of Appeals, on the first day of August, 1913, for an order granting leave to said defendant to appeal to the Court of Appeals from the judgment of the Appellate Division, Fourth Department, unanimously affirming the judgment of the trial court, and after hearing Lester F. Gilbert, Esq., of counsel for defendant, in support of said application, and W. J. Flynn, Esq., of Counsel for the plaintiff, in opposition thereto, and due consideration having been had,

It is ordered, that the defendant's application for leave to appeal to the Court of Appeals be and the same hereby is denied.

Dated Buffalo, N. Y., August 20, 1913.

W. H. CUDDEBACK,
Associate Judge of the Court of Appeals.

121 [Endorsed:] Supreme Court, Erie County. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Co., Defendant. Copy. Order. Hoyt & Spratt, Attorneys for Defendant, Office and Post Office Address: 77 West Eagle Street, Buffalo, New York. Personal service of the within — and of the notice hereon endorsed, is admitted this 23 day of August, 1913. Hamilton Ward, Attorney for Plaintiff below. Filed Erie Co. Clerk's Office, Aug. 29, 1913.

122 Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States and that the Clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers designated herein:

Summons,
Amended complaint,
Amended answer,
Order of substitution,
Clerk's minutes,
Case and exceptions,
Defendant's motion for nonsuit,
Charge of the Court,
Judgment for the plaintiff,
Order denying motion for a new trial,
Opinion of Justice Wheeler,
Notice of appeal to the Appellate Division,
Stipulation that foregoing documents and all other papers and documents in the case contained are correct transcripts of the originals,
Exhibit C.—Report of Freight and other cars, November 18th, 1910, from Rochester to East Buffalo. Admitted at folio 108. Printed as an insert in rear of book.
Affidavit of no opinion in the Appellate Division,
Order of Appellate Division affirming judgment below,
Judgment of affirmance,
Order of Appellate Division denying leave to appeal to the Court of Appeals,

Opinion of Judge Cuddeback,
Order of Judge Cuddeback denying leave to appeal to the Court of Appeals.

HAMILTON WARD,
Attorneys for Plaintiff.
HOYT & SPRATT,
Attorneys for Defendant.

[Endorsed:] Supreme Court, Erie County. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Company, Defendant. Copy. Stipulation Pursuant to Rule 8 of the Supreme Court of the U. S. Hoyt & Spratt, Attorneys for Defendant-, Office and Post Office Address: 77 West Eagle Street, Buffalo, New York. Filed Erie Co. Clerk's Office, Aug. 29, 1913.

123 Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

I, Simon A. Nash, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Bernard J. Carr, Plaintiff against The New York Central and Hudson River Railroad Company, Defendant, as set forth in the stipulation made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto on the — day of August, 1913 and hereto annexed, and also of the opinion of the Trial Court rendered herein and of the opinion of the Honorable William H. Cuddeback, wherein he denied the motion of the defendant for leave to go to the Court of Appeals, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in my office at Buffalo, New York this 30th day of August, 1913.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court, State of New York, County of Erie.

[Endorsed:] Supreme Court, Erie County. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Company, Defendant. Original. Authentication of Record. Hoyt & Spratt, Attorneys for Defendant, Office and Post Office Address: 77 West Eagle Street, Buffalo, New York.

124 To the Supreme Court of the United States:

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error (Defendant Below),
vs.
BERNARD J. CARR, Defendant in Error (Plaintiff Below).

And now comes The New York Central and Hudson River Railroad Company, the plaintiff in error, and prays for a reversal of the judgment of the Appellate Division of the Supreme Court, State of New York, of the Fourth Department, in the action brought by Bernard J. Carr, plaintiff-respondent, against The New York Central and Hudson River Railroad Company, defendant-appellant, which judgment was entered in the office of the Clerk of the County of Erie on or about the 16th day of June, 1913; and it also prays for a reversal of the order of affirmance in said action by said Appellate Division, entered in the office of the Clerk of said Appellate Division on or about the 11th day of June, 1913; and it also prays for a reversal of the judgment in said action of the Supreme Court, State of New York, in and for the County of Erie, entered in the office of the Clerk of the County of Erie on or about the 15th day of July, 1912.

CHARLES C. PAULDING,
Of Counsel for the New York Central and Hudson River Railroad Company, Grand Central Terminal, New York, N. Y.

Petition for writ of error allowed this 21st day of August, 1913, Lake Placid, New York.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

125 To the Honorable Edward Douglas White, Chief Justice of the United States; and to the Honorable Charles Evans Hughes, Associate Justice of the Supreme Court of the United States; and to the other Justices of said Honorable Court and to the Honorable the Supreme Court of the United States:

The petition of The New York Central and Hudson River Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the City of Albany in the State of New York, respectfully shows:

I. Heretofore and on or about the 5th day of June, 1911, an action was commenced in the Supreme Court of the State of New York for the County of Erie by Bernard J. Carr, plaintiff, against your petitioner The New York Central and Hudson River Railroad Company, defendant. The plaintiff in said action alleged:

First. That the defendant is, and at all times hereinafter mentioned was a domestic railroad corporation, engaged in maintain-

ing and operating a steam railroad in and through various portions of the State of New York, and especially in and through the Town of Tonawanda, Erie County, N. Y., and that it has its office and principal place of business in the City of New York.

Second. That on or about the 18th day of November, 1910, and for sometime prior thereto, the plaintiff was in the employ of the defendant as a brakeman.

Third. That on the 18th day of November, 1910, the defendant operated a freight train over its tracks in the Town and City of Tonawanda, Erie County, N. Y.. and that the plaintiff was employed thereon. That in placing and switching various cars of said freight train, it became necessary to push certain cars upon a switch, in order to clear the track for an approaching passenger train, and that it became the duty of the plaintiff, as such brakeman to ride upon the cars being so pushed, for the purpose of con-
126 trolling their movement by means of a hand brake, located thereon. That such hand brake, operated upon a brakeshoe, which was also connected with the air brake system of the said train and cars; that the said train and cars were equipped with air brakes, which involve a hose connection between the cars and between the cars and the engine, and that any sudden breakage of such hose connection operates to put the air brakes on suddenly. That the cars upon this train were equipped with such air brakes, and that at the end of each car was what is known as an angle cock, which is used to turn off the air when cars are separated from each other, or from the engine, so as to prevent the sudden application of the air brakes, as aforesaid.

And the plaintiff further alleged, that one of the cars, which he was required to control, was connected with the engine by an air hose, while such movement was being made. That when the time came to disconnect such engine, the person, charged with that duty, and who was in the employ of the defendant, proceeded to separate such car and engine, and at the same time attempted to turn the angle cock to prevent the sudden application of air to the cars upon which the plaintiff was riding. That such angle cock was broken, insufficient and defective, so that it could not be turned, and did not shut off the air, and that as a result thereof, the air was suddenly applied to the cars upon which the plaintiff was riding, causing them to suddenly stop with a violent jerk. That the plaintiff was on top of a box car, endeavoring to tighten the hand brakes which, operated by a brake wheel, elevated somewhat above the top of the box car. That this brake was so constructed that when the air brake went on, such brake wheel would suddenly jerk in a
127 reverse direction from that in which it was being turned. That most of the cars, owned or operated by the defendant, were so furnished and equipped that when this jerk came, it came in the direction in which the brake was being turned, and not in the opposite direction, with which latter type of cars the plaintiff had had no experience, and concerning the ope-ation of which he had not been warned or instructed. That such sudden jerk, and the sudden jar and stoppage of the car, caused the plaintiff to lose his

balance and fall to the ground, receiving the injuries to be hereafter set forth.

And the plaintiff further alleged, that the defective and imperfect angle cock, as before set forth, and the construction of the brakes upon the car upon which the plaintiff was riding causing them to operate in a reverse direction when the air was applied, constituted a defect in the condition of such cars and the attachments thereto belonging, and that such defect could have been discovered by the defendant by reasonable and proper care, tests and inspection, and was not so discovered by the defendant or, if discovered by the defendant, was permitted to continue in the dangerous and unsafe condition in which they were at the time of the accident. That such accident was brought about solely and wholly by reason of the negligence of the defendant.

Fourth. And the plaintiff further alleged, that by virtue of an Act of Congress, known as an act, relating to the liability of common carriers by railroads to their employees, in certain cases, approved April 22nd, 1908, and by virtue of the certain amendments thereto approved April 5th, 1910, jurisdiction was conferred upon the State Courts of the State of New York to enforce the liability of railroad corporations to their employees, as defined in such acts of congress.

128 And the plaintiff further alleged, upon information and belief, that on the 18th day of November, 1910, the said Acts were in full force and effect, and that upon that day, the defendant was a common carrier, engaged in commerce between the several states of the United States, and between the states of the United States and a foreign nation, to wit, the Dominion of Canada, and that the plaintiff was employed by the defendant in such commerce at the time of his injury, and that such injury occurred through the neglect of the defendant, its officers, agents and employees, and by reason of the defective and insufficient condition of its appliances, cars and machinery, as hereinbefore set forth.

Fifth. That by reason of the matters before set forth, the plaintiff has been seriously and permanently injured. He has suffered and still continues to suffer much pain; the bones of his right foot and leg have been smashed and broken, and he has suffered other injuries thereto; he has been lacerated and injured in his head, body and limbs; has been put to much expense for nursing, medicines and medical attendance; has been incapacitated from labor; permanently crippled and damaged in the sum of twenty-five thousand dollars ($25,000.00).

Said complaint demanded judgment in favor of the plaintiff and against the defendant in the sum of Twenty-five thousand dollars, besides the costs of the action.

II. Your petitioner duly answered said complaint. Said answer denied the allegations of negligence on the part of the defendant, but admitted that on the 18th day of November, 1910, the plaintiff then and for some time prior thereto was in the employment of the defendant as a freight brakeman and met with an accident at North Tonawanda, N. Y., and sustained certain injuries; that the acts

of Congress referred to in the complaint were in full force and effect; and that the defendant was a common carrier, en-
129 gaged in interstate commerce with the Dominion of Canada; but in said answer defendant denied that either the plaintiff or the defendant was so engaged at the time of the accident to plaintiff. The issues raised by said pleadings came on for trial June 21, 1912, before Mr. Justice Wheeler, at a trial term of said Supreme Court held in Erie County, New York. Upon said trial it appeared by the evidence, without dispute, that the accident to the plaintiff happened by reason of the negligence solely of a fellow servant of the plaintiff, one O'Brien, a brakeman. That the plaintiff was a brakeman employed on the same train as said O'Brien. That shortly before the accident said train, which contained cars whose points of origin and destination were both within the State of New York and other cars whose points of origin and destination were in different States, came to a stop at a station in the State of New York. That a car whose origin was at a point in the State of New York and whose destination was at said station in the State of New York—in other words, a car containing a carload shipment and employed wholly in intrastate commerce—was removed from said train by the locomotive attached thereto and placed upon a siding or switch track. That while said car was being moved upon said track, in furtherance of intrastate commerce solely, said brakeman O'Brien suddenly disconnected from said locomotive the air hose coupling by means of which the air brakes on said car were controlled from said locomotive. That by reason of cutting said air hose connection, the brake-wheel upon said car was caused suddenly and
130 violently to revolve in the opposite direction from that in which it would be turned for the purpose of setting the hand brake on said car. That the plaintiff was at the time on top of said car, resting his hands and the weight of his body on said brake-wheel; that in consequence of the sudden turning of said brake-wheel, caused by the act of said brakeman O'Brien in cutting said air hose connection, plaintiff was precipitated from the car to the ground and suffered personal injuries. At the close of said trial your petitioner moved to dismiss the complaint in said action for several reasons, among other reasons, specifying the following: Upon the ground that no cause of action had been made out under the Federal Employers' Liability Act; upon the ground that the said Supreme Court of the State of New York had no jurisdiction of any cause of action under the Federal Employers' Liability Act, because the accident did not happen while the plaintiff and defendant were engaged in interstate commerce; upon the ground that the accident to plaintiff happened while the plaintiff and defendant had desisted from interstate commerce and engaged in intrastate commerce, and that therefore no cause of action was made out under the Federal Employer's Liability Act; upon the ground that if applied to such facts established in this case without contradiction, the Federal Employers' Liability Act is unconstitutional as a deprivation of property without due process of law, as an impairment of the rights reserved to the States, as in excess of the power of Congress

under the commerce clause of the Constitution, and as depriving the defendant of the equal protection of the laws. Said motion to dismiss was denied, and your petitioner duly excepted to the denial of said motion. The trial court thereupon submitted the evidence adduced by the plaintiff and defendant in said case to the
131 jury, and in the course of his charge to the jury instructed the jury that the sole question for them to determine in deciding whether the defendant was or was not guilty of negligence was whether one O'Brien, a brakeman in the employ of the defendant and a fellow servant of the plaintiff, negligently caused the injury of the plaintiff. And said trial court charged the jury that solely under the Federal Employers' Liability Act the defendant was liable for the negligence, if any, of said O'Brien, a fellow servant of the plaintiff, and that said Federal Employers' Liability Act applied to the facts adduced upon the trial of this case. To all of which instructions so given the defendant duly excepted. The case was submitted to the jury, and the jury brought in a verdict in favor of the plaintiff and against the defendant, on the 26th day of June, 1912, for the sum of $3,500. Subsequently and in accordance with the provisions of Section 999 of the Code of Civil Procedure of the State of New York, the defendant moved to set aside the verdict and moved for a new trial upon all the grounds hereinbefore stated and upon all the grounds specified in Exhibit A, printed at page 88a of the record on appeal to the Appellate Division of the Supreme Court of the State of New York, Fourth Department, to which reference is hereby made. Among the grounds upon which defendant so moved for a new trial were the following: That the Court erred in submitting to the jury the question of Brakeman O'Brien's negligence, for the following reasons, viz: Because the interpretation of the Federal Employers' Liability Act under which the Court submitted the question is unconstitutional, since the Act if so construed would apply to commerce wholly intrastate, and the Act by its wording is indivisible, and the Act if so construed would violate the United States Constitution, Article 1, Section 8, Amendments V, VII, X and XIV; also because if that interpretation of the Act under which the Court submitted the question to the jury
132 is correct, the Act itself is unconstitutional, since the act if so construed would apply to commerce wholly intrastate, and the act by its wording is indivisible, and the act if so construed would violate the United States Constitution, Article 1, Section 8, and Amendments V, VII, X and IV. Said motion to set aside he verdict and for a new trial was denied by an order of the Supreme Court, Erie County, made on the 26th day of June, 1912. Subsequently judgment was entered in said action, on or about the 15th day of July, 1912, which judgment provided as follows: It is hereby adjudged by the Court that the plaintiff herein, Bernard J. Carr, recover of the defendant, The New York Central and Hudson River Railroad Company, the sum of Three thousand five hundred dollars, so found by said jury, together with the sum of One hundred fifteen dollars fifty-one cents, costs and disbursements in this action, amounting in all to the sum of Three thousand six hundred fifteen

dollars and fifty-one cents, and that the plaintiff have execution against said defendant therefor.

III. Thereupon your petitioner duly appealed from said judgment and from said order denying your petitioner's motion for a new trial to the Appellate Division of the Supreme Court of the State of New York, Fourth Department. Said appeal duly came on for argument before said Appellate Division, and your petitioner through its counsel duly argued that said judgment should be reversed, and that said complaint should be dismissed, for the reason that under the facts proved without dispute in said case, the plaintiff and defendant at the time of the plaintiff's accident were exclusively engaged in intrastate commerce, inasmuch as the plaintiff had then and there desisted from his work as a brakeman on an interstate train and had engaged in a movement entirely separate from said train, of a carload shipment on the defendant's railroad which had originated at a point within the State of New York and was being delivered at a point within the State of New York;
133 and for the further reason that any construction or interpretation of the Federal Employers' Liability Act which would make such act apply to the relationship of master and servant existing between the plaintiff and defendant at the time when the accident to the plaintiff occurred would infringe upon the power and jurisdiction of the State of New York over commerce wholly within the State of New York, and would therefore be unconstituional; and the defendant company duly urged upon said Court that inasmuch as the trial court had submitted the case to the jury solely upon the question of liability under the Federal Employers' Liability Act, there being no statute of the State of New York which would render the defendant liable for the negligence of the brakeman O'Brien, a fellow servant of the plaintiff, the defendant-appellant company was entitled to a judgment of said Appellate Division reversing the judgment below absolutely and dismissing the complaint; and your petitioner then in said appellate court, and previously in said court of first instance, insisted that it had a title, right, privilege and immunity under the Constitution and statutes of the United States which relieved it from the jurisdiction and from any application of the Federal Employers' Liability Act, and submitted it solely to the liabilities imposed by the common law and statutes of the State of New York, which said liabilities did not include any liability in this action.

IV. Thereafter and on or about the 11th day of June, 1913, said Appellate Division of the Supreme Court, Fourth Department, made an order, which was entered in the office of the Clerk of said Appellate Division, and which order affirmed said judgment and said order denying your petitioner's motion for a new trial, and on or about the same day a certified copy of said order, together with the original papers on said appeal, was entered in the office of the Clerk of the County of Erie, State of New York. Subsequently and on or about the 16th day of June, 1913, a judgment of affirmance
134 and for the costs taxed upon said appeal was thereupon entered in the office of the Clerk of the County of Erie, which

judgment directed as follows, viz: That said judgment entered in the office of the Clerk of the County of Erie on the 15th day of July, 1912, be affirmed, and that the plaintiff recover of the defendant the sum of One hundred eighty-eight dollars and seventy-two cents, costs on said appeal, and that said plaintiff have execution therefor. Said decision of the Appellate Division was unanimous.

V. The Constitution and laws of the State of New York provide, as set forth in Section 191 of the Code of Civil Procedure, that no appeal shall be taken to the Court of Appeals of said State from a judgment in an action for negligence causing personal injuries when the decision of the Appellate Division is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify an appeal is allowed by a Judge of the Court of Appeals. This action was one solely for negligence causing personal injuries. Subsequently to said order and judgment of affirmance by said Appellate Division, your petitioner duly applied to said Appellate Division and requested said Appellate Division to certify that in its opinion a question of law was involved in said case which ought to be reviewed by the Court of Appeals, and requested said Appellate Division to allow an appeal from said judgment to said Court of Appeals; but said Appellate Division refused to make such certification and refused to allow such appeal. Thereupon your petitioner duly applied to Honorable William H. Cuddeback, a Judge of the Court of Appeals of said State, and moved before him for the allowance of an appeal to said Court of Appeals from said judgment; but on August 20, 1913, the said Judge Cuddeback denied said motion, handing down a memorandum opinion as follows: "In view of the fact that the only question involved is the interpretation of the Federal Statute, I think it would be as well to take the case directly to the United
135 States Supreme Court, and therefore the application for leave to appeal to the Court of Appeals is denied. W. H. Cuddeback, Judge, Court of Appeals."

VI. Upon said trial and upon said appeal and upon said subsequent motions which were made in said Appellate Division and before said Judge of the Court of Appeals, your petitioner duly argued and insisted and asked that said judgment should be reversed and said complaint should be dismissed, upon the ground that the Federal Employers' Liability Act had no application to the facts of the case inasmuch as the plaintiff and defendant, at the time of the accident to plaintiff, were engaged in intrastate and not in interstate commerce, and that therefore the defendant was not liable for the negligence of its brakeman O'Brien, a fellow servant of the plaintiff, there being no state statute or rule of law by which the defendant was made liable for said O'Brien's negligence. Said objection made by your petitioner was overruled in all of said Courts. Your petitioner duly excepted to said ruling in the trial court. Your petitioner argued in said Appellate Division and before said Judge of said Court of Appeals the question of the application of said Federal Employers' Liability Act as hereinbefore set forth. Said decisions

of said courts and judges, and of each of them, denied to your petitioner a title, right, privilege and immunity held by your petitioner under the Constitution and statutes of the United States.

Wherefore, your petitioner prays that a writ of certiorari may issue and that it may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Appellate Division of said Supreme Court of the State of New York; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By CHARLES C. PAULDING, *Counsel,*
Grand Central Terminal, New York, N. Y.

MAURICE C. SPRATT,
Of Counsel.

136 STATE OF NEW YORK,
County of Erie, ss:

Maurice C. Spratt, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, The New York Central and Hudson River Railroad Company. That the reason why this verification is made by deponent instead of by the petitioner is that said petitioner is a corporation; that none of its officers resides or is within the County of Erie, State of New York, where deponent resides and has his place of business. That the foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and behalf, and as to those matters I believe the same to be true.

MAURICE C. SPRATT.

Subscribed and sworn to before me, this 20 day of August, 1913.
ALFRED L. BECKER,
Notary Public, Erie Co., N. Y.

137 Supreme Court of the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error (Defendant Below),
vs.
BERNARD J. CARR, Defendant in Error (Plaintiff Below).

And now comes The New York Central and Hudson River Railroad Company, plaintiff in error, and makes and files this its assignment of errors:

I. The Appellate Division of the Supreme Court for the Fourth Department erred in refusing to reverse the judgment of the Supreme Court below and the order of the Court below denying defendant's motion for a new trial, for the reason that the cause of action proved

and submitted to the jury therein was based exclusively upon the Federal Employers' Liability Act, and such act when properly construed had no application to the facts as proved without dispute upon the trial of said case, inasmuch as neither defendant nor plaintiff was at the time and place of the accident engaged in interstate commerce or in commerce between the United States and a foreign nation or in commerce within a territory of the United States.

II. The Supreme Court of the State of New York for the County of Erie erred in refusing to dismiss the complaint for the same reasons.

III. The said Supreme Court erred in denying defendant's motion for a new trial for the same reasons.

IV. Said Appellate Division erred in refusing to reverse the judgment below and order denying defendant's motion for a new trial for the reason that under no statute of the State of New York was the defendant made liable for the negligence of the brakeman O'Brien, and there were no facts proved or submitted to the jury tending to show negligence of the defendant on any other ground than that of the negligence of the brakeman O'Brien, and the Federal Employers' Liability Act had no application to the
138 accident.

V. The Supreme Court of the State of New York for the County of Erie erred in refusing to dismiss the complaint for the same reasons.

VI. The said Supreme Court erred in denying defendant's motion for a new trial for the same reasons.

VII. The said Appellate Division erred in refusing to reverse the judgment of the Supreme Court below and the order denying defendant's motion for a new trial, for the reasons that the Federal Employers' Liability Act as construed in the Court below and applied to the facts proved without dispute in this case, is unconstitutional as exceeding the power to regulate commerce granted to Congress by the Constitution of the United States of America and infringing upon the powers not so granted to Congress and reserved to the State by said Constitution.

VIII. Said Supreme Court of the State of New York for the County of Erie erred in refusing to dismiss the complaint for the same reason.

IX. Said Supreme Court erred in denying defendant's motion for a new trial for the same reasons.

X. Said Supreme Court of the State of New York for the County of Erie erred in instructing the jury that if they found that the brakeman O'Brien's negligence caused the accident they could find a verdict against the defendant, and in refusing to charge the jury as requested that if they found that the brakeman O'Brien caused the accident the verdict must be in favor of the defendant of no cause of action.

XI. Said Appellate Division erred in refusing to reverse the judgment of the Supreme Court of the State of New York for the County of Erie, hereinabove referred to, and the order denying defendant's

motion for a new trial, on the ground of said errors in charging the jury and in refusing to charge as requested, last above specified.

139 XII. Said Supreme Court of the State of New York for the County of Erie erred in denying the defendant's motion for a new trial, upon the grounds last above stated

XIII. Said Appellate Division erred in affirming the judgment of the Supreme Court of the State of New York, for the County of Erie, hereinbefore referred to.

XIV. Said Appellate Division erred in affirming the order of the Supreme Court of the State of New York, for the County of Erie, denying the motion of the defendant below for a new trial, hereinbefore referred to.

CHARLES C. PAULDING,
Counsel for Plaintiff in Error,
Grand Central Terminal, New York, N. Y

140 [Endorsed:] Supreme Court of the United States. The New York Central and Hudson River Railroad Co., Plaintiff in Error, Defendant Below, vs. Bernard J. Carr, Defendant in Error, Plaintiff Below. Original. Prayer for Reversal, Petition for Writ of Error, and Assignment of Errors. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address: 77 West Eagle Street, Buffalo, New York. Personal service of the within Prayer for Reversal, Petition for Writ of Error and Assignment of Errors and of the notice hereon endorsed, is admitted this 23rd day of August, 1913. Hamilton Ward, Attorney for Plaintiff in Error. Filed Erie Co. Clerk's Office, Aug. 22, 1913.

141 **Copy.**

Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

Know all men by these presents, That the National Surety Company, a corporation, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, City of New York, New York, is held and firmly bound unto the above named Bernard J. Carr, in the sum of Six thousand dollars ($6,000), to be paid to the said Bernard J. Carr, for the payment of which well and truly to be made it binds itself, its successors and assigns firmly by these presents.

Sealed with the seal of said corporation, and dated the — day of August in the year of our Lord, One Thousand Nine Hundred and Thirteen.

Whereas, the above named The New York Central and Hudson River Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the order and judgment

rendered in the above entitled action by the Appellate Division of the Supreme Court of the State of New York, Fourth Department;

Now, therefore, the condition of this obligation is such that if the above named The New York Central and Hudson River Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] NATIONAL SURETY COMPANY,
By EDWARD A. KING, *Attorney in Fact.*

Dated, Buffalo, N. Y., Aug. 20, 1913.

Approved, Lake Placid, New York, August 21st, 1913.
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

142 **Copy.**

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 20th day of August, 1913, before me personally appeared Edward A. King, Attorney in Fact of the National Surety Company, a New York corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in Buffalo, N. Y. that he is the Attorney in Fact of the said National Surety Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to the within instrument is such corporate seal, and that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto as Attorney in Fact by like order, and deponent further say that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 183 of Chapter 33 of the Laws of New York for the year 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York.

[SEAL.] E. G. KINKEL,
Notary Public, Erie County, N. Y.

Copy of By-law.

Be it Remembered, That at a meeting of the Board of Directors of the National Surety Company, duly called and held on the second day of February, A. D. 1909, a quorum being present, the following By-Law was adopted:

"Article XII. Resident Officers and Attorneys-in-Fact.

"SECTION 1. The President, First Vice-President or any other "Vice-President may from time to time appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys-in-Fact "to represent and act for and on behalf of the Company, and either

"the President, First Vice-President, or any other Vice-President, "the Board of Directors or the Executive Committee may at any "time remove any such Resident Vice-President, Resident Assist- "ant Secretary or Attorney-in-Fact and revoke the power and au- "thority given him.

"SECTION 4. Attorneys-in-fact.—Attorneys-in-Fact may be given "full power and authority to execute for and in the name and on "behalf of the Company, any and all bonds, recognizances, con- "tracts of indemnity and other writings obligatory in the nature of "a bond, recognizance or conditional undertaking, and any such "instrument executed by any such Attorney-in-Fact shall be as "binding upon the Company as if signed by the President and "sealed and attested by the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Laws was adopted:

"SECTION 6. Attorneys-in-Fact.—Attorneys-in-Fact are hereby "authorized to verify any affidavit required to be attached to bonds, "recognizances or contracts of indemnity, policies of insurance and "all other writings obligatory in the nature thereof, and are also "authorized and empowered to certify to a copy of any By-Laws "contained in Articles VI, XII and XIII of the By-Laws of the "Company."

I, Edward A. King, Res. Assistant Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of Sections One, Four and Six, of said By-Law.

Given under my hand and the seal of the Company, at New York, N. Y., this 20th day of August, 1913.

[SEAL.]

EDWARD A. KING,
Res. Assistant Secretary.

143 Copy.

National Surety Company of New York.

Financial Statement, March 31st, 1913.

Wm. B. Joyce, President. Hubert J. Hewitt, Secretary.

Assets.

Cash in Banks and Offices	$536,129.62
Government, Municipal and Other Bonds, and Stocks	5,530,244.46
Real Estate and Mortgage Loans	178,133.60
Unpaid Premiums (excluding Premiums 90 days overdue)	770,055.63
Accrued Interest and Accounts Receivable	257,912.87
Total	**$7,272,476.18**

Liabilities.

Unearned Premium Reserve	$2,148,108.32
Reserve for Contingent Claims (Less Reinsurance)	1,309,978.33
Contingent Reserve for Loss Expense	35,472.30
Anticipated Taxes and Commissions (not due)	179,418.76
Accounts Payable (not due)	95,746.00
Dividend Declared Payable on April 1st, 1913	60,189.00
Capital Stock	2,000,000.00
Surplus	1,443,563.47
Total	$7,272,476.18

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Edward A. King being duly sworn, says: That he is Res. Assistant Secretary of the National Surety Company, that said Company is a corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New York applicable to said Company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To Be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial condition of said Company on the 31st day of March, 1913.

EDWARD A. KING.

Sworn to before me this 20th day of August, 1913.

[SEAL.] E. G. KINKEL,
Notary Public, Erie Co., N. Y.

144 Copy.

National Surety Company, New York.

Home Office, 115 Broadway.

At a meeting of the Board of Directors of the National Surety Company, held at the office of the Company, at the City of New York, State of New York on the Sixth day of June, 1912, at which was present a quorum of said Directors, duly authorized to act on the premises. On motion it was unanimously resolved:

That in pursuance of Section 811 of the New York code of Civil Procedure, Charles N. Armstrong, Franklin D. L. Stowe and Maulsby Kimball, Resident Vice-Presidents, and Edward A. King, Attorney-in-Fact, Residents of the City of Buffalo, Erie County, N. Y.; also Mortimer A. Federspiel, Abner T. Hopkins and William

W. Brim, Attorneys-in-Fact, residents of the City of Lockport, Niagara County, N. Y., be and each of them is hereby authorized and empowered to execute and deliver for, and on behalf of this Company, any and all bonds or undertakings mentioned and referred to in said Section 811, or otherwise, that may be given or required in any Court or legal proceedings in Erie, Niagara and other Counties in the State of New York, and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company; such obligations, however, in every instance, when signed by any of said Resident Vice-Presidents, to be attested by one of the following Resident Assistant Secretaries: Frank W. Fiske, Jr., Thomas G. Perkins and Edward A. King, all residents of the City of Buffalo, Erie County, N. Y.

STATE OF NEW YORK,
County of New York, ss:

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, do hereby certify that I have compared the foregoing resolution with the original thereof as recorded in the Minute Book of the said Company, and do further certify that the same is a true and correct transcript therefrom and the whole of said resolution.

Given under my hand and the seal of the Company, City of New York, this 30th day of August, 1912.

[SEAL.] WM. I. HAWKS,
Assistant Secretary.

145 [Endorsed:] Supreme Court of the United States. The New York Central and Hudson River Railroad Co., Plaintiff in Error, Defendant Below, vs. Bernard J. Carr, Defendant in Error, Plaintiff Below. Copy. Supersedeas Bond. Hoyt & Spratt, Attorneys for Plaintiff in Error, office and post-office address 77 West Eagle Street, Buffalo, New York. Personal service of the within Supersedeas Bond and of the notice hereon endorsed, is admitted this 23rd day of August, 1913. Hamilton Ward, Attorney for Plaintiff below. Filed Erie Co. Clerk's Office, Aug. 22, 1913.

146 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Appellate Division of the Supreme Court, State of New York, Fourth Department, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Bernard J. Carr and The New York Central and Hudson river Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United

States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New York Central and Hudson River Railroad Company, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 20th day of September next, in the said Supreme Court, to be then and
147 there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 21st day of August, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Western District of New York.]

S. W. PETRIE,
Clerk of the District Court of the United States,
Western District of New York.

Allowed by

CHARLES E. HUGHES,
Associate Justice of the Supreme Court
of the United States.

148 [Endorsed:] Supreme Court of the United States. The New York Central and Hudson River Railroad Co., Plaintiff in Error, Defendant Below, vs. Bernard J. Carr, Defendant in Error, Plaintiff Below. Original. Writ of Error. Hoyt & Spratt, Attorneys for Plaintiff in Error, office and post-office address, 77 West Eagle Street, Buffalo, New York. Personal service of the within Writ of Error and of the notice hereon endorsed, is admitted this 23rd day of Aug. 1913. Hamilton Ward, attorney for plaintiff below. Filed Erie County Clerk's Office, Aug. 22, 1913.

149 Supreme Court, Erie County.

BERNARD J. CARR, Plaintiff,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

I, Simon A. Nash, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on the 22nd day of August, 1913 in the matter of Bernard J. Carr, Plaintiff against The New York Central & Hudson River Railroad Company, Defendant:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error above and the plaintiff below and one to file in my office.
3. One copy of the petition, assignment of error and prayer for reversal herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in my office at Buffalo, New York this 30th day of August, 1913.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court, State of New York,
County of Erie.

150 [Endorsed:] Supreme Court, Erie County. Bernard J. Carr, Plaintiff, vs. The New York Central and Hudson River Railroad Company, Defendant. Original. Certificate of Lodgment. Hoyt & Spratt, Attorneys for Defendant, office and post-office address 77 West Eagle Street, Buffalo, New York.

151 UNITED STATES OF AMERICA, *ss:*

To Bernard J. Carr, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the County of Erie in the State of New York, wherein The New York Central and Hudson River Railroad Company is plaintiff in error and Bernard J. Carr is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 21st day of August in the Year of our Lord One Thousand Nine Hundred and Thirteen.

CHARLES E. HUGHES,
Associate Justice of the United States Supreme Court.

152 [Endorsed:] Supreme Court of the United States. The New York Central and Hudson River Railroad Co., Plaintiff in Error, Defendant Below, vs. Bernard J. Carr, Defendant in Error, Plaintiff Below. Original. Citation. Hoyt & Spratt, Attorneys for Plaintiff in Error, office and post-office address 77 West Eagle Street, Buffalo, New York. Personal service of the within Citation and of the notice hereon endorsed, is admitted this 23 day of August, 1913. Hamilton Ward, Attorney for plaintiff below.

153 UNITED STATES OF AMERICA,
Supreme Court of New York, Erie County, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the within entitled case as in pursuance of Rule 8 of the Supreme Court of the United States the attorneys for the respective parties hereto have by stipulation designated, with all things concerning same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court of New York, Erie County in the State of New York, this 30th day of August, 1913.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court, State of New York,
County of Erie.

Costs of transcript $1.75 paid by The New York Central and Hudson River Railroad Company.

S. A. NASH,
Clerk of the Supreme Court, State of New York,
County of Erie.

Endorsed on cover: File No. 23,848. New York Supreme Court, Appellate Division, Fourth Department. Term No. 257. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. Bernard J. Carr. Filed September 12th, 1913. File No. 23,848.

21

Office Supreme Court, U. S.
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CLERK

(23848)

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 257.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiff-in-Error,

vs.

BERNARD J. CARR.

Brief for Petitioner on Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York.

MAURICE C. SPRATT,
LESTER F. GILBERT,
Of Counsel.

Statement of the Case..... 1

Facts 3

Specification of Errors..... 6

Point I—Recovery cannot be sustained under the Federal Employers' Liability Act, because neither the Plaintiff nor the Defendant was, at the time and place of the accident, engaged in interstate commerce..... 8

Review of Decisions in the Lower Courts.... 20

Consideration of Plaintiff's Arguments..... 31

Prayer for Judgment of Reversal..... 37

INDEX

LIST OF CASES.

(Index to names of both parties.)

PAGE

Anderson, Standard Oil Co. vs., 212 U. S., 215. 35

A. T. & St. F. R. Co. vs. Pitts, ... Okla., ... (decided Jan. 19, 1915), (145 Pac., 1148).... 24

Barlow vs. Lehigh V. R. Co., 214 N. Y., 116.... 36

Behrens, Illinois Central R. R. Co. vs., 223 U. S., 473.....9, 10, 12, 13, 18

Connole vs. Norfolk & Western R. Co., 216 Fed., 824..... 23

Chicago W. I. R. Co., Patry vs., 265 Ill., 310 (106 N. E., 843): affirming 185 Ill. App.,361. 25

D. L. & W. R. R. Co., Pedersen vs., 229 U. S., 146 .....11, 12

D. L. & W. R. R. Co., Shanks vs., 163 A. D., 565 (148 N. Y. Supp., 1034); affirmed N. Y. Law Journal, April 7, 1915..... 21

Erie R. R. Co., Norton vs., 163 A. D., 466 (148 N. Y. Supp., 769)..... 26

Great Western Ry. Co., Reed vs. (1909), A. C. 31 35

PAGE

Horton, Seaboard Air Line R. Co. vs., 223 U. S., 492 8

Hayes, Wabash R. Co. vs., 234 U. S., 86 8

Illinois Central vs. Behrens, 233 U. S., 473 .... 9, 10, 12, 13, 18

Knowles vs. N. Y. C. & H. R. R. R. Co., 164 A. D., 711 (150 N. Y. Supp., 99) 9

LaCasse vs. N. O. T. & M. R. Co., 135 La., 129; 64 So., 1012 22

Lamphere vs. Oregon R. & N. Co., 196 Fed., 336 19

Lehigh Valley R. Co., Barlow vs., 214 N. Y., 116 36

McAuliffe vs. N. Y. C. & H. R. R. R. Co., 164 A. D., 846 (150 N. Y. Supp., 512) 9, 25

Minnesota Rate Cases, 230 U. S., 352 36

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1 .....8, 10, 11, 19, 31, 33

N. Y., N. H. & H. R. R. Co., Mondou vs., 223 U. S., 1 .....8, 10, 11, 19, 31, 33

N. Y. C. & H. R. R R Co., Knowles vs., 164 A. D., 711 (150 N. Y. Supp., 99 9

N. Y. C. & H. R. R. R. Co., McAuliffe vs., 164 A. D., 846 (150 N. Y. Supp., 512 .....9, 25

Norfolk & W. R. Co., Connole vs., 216 Fed., 824. 23

PAGE

N. O. T. & M. R. Co., LaCasse vs., 135 La., 129; 64 So., 1012 22

North Carolina R. Co. vs. Zachary, 232 U. S., 248 ..... 8, 16

Norton vs. Erie R. Co., 163 A. D., 466 (148 N. Y. Supp., 769) 26

Oregon R. & N. Co., Lamphere vs., 196 Fed., 336 19

Patry vs. Chicago & W. I. R. Co., 265 Ill., 310 (106 N. E., 843), affirming 185 Ill. App., 361. 25

Pitts, A. T. & S. F. R. Co. vs., ... Okla., ... (decided Jan. 19, 1915), (145 Pac., 1148) ... 24

Pedersen vs. D. L. & W. R. Co., 229 U S., 146.. 11, 12

Reed vs. Great Western R. Co. (1909), A. C. 31. 35

Shanks vs. D. L. & W. R. Co., 163 A. D., 565 (148 N. Y. Supp., 1034); affirmed N. Y. Law Journal, April 7, 1915 21

Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492 8

Second Employers' Liability Cases, 223 U. S., 1 8, 10, 11, 19, 31, 33

St. L. S. F. & T. R. Co. vs. Seale, 229 U. S., 156. 8, 16

Seale, St. L. S. F. & T. R. Co. vs., 229 U. S., 156 8, 16

PAGE

Standard Oil Co. vs. Anderson, 212 U. S., 215.. 35

Southern Ry. Co. vs. U. S., 222 U. S., 20....32, 33

Safety Appliance Cases, 222 U. S., 20.....32, 33

Texas & P. R. Co., VanBrimmer vs., 190 Fed., 394 28

U. S., Southern R. Co. vs., 222 U. S., 20....32, 33

VanBrimmer vs. Texas & P. R. Co., 190 Fed., 394 28

Wabash R. Co. vs. Hayes, 234 U. S., 86..... 8

Zachary, North Carolina R. Co. vs. 232 U. S., 248 .....8, 16

(23848)

SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 257.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff-in-Error,

AGAINST

BERNARD J. CARR.

BRIEF FOR PETITIONER ON WRIT OF ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, STATE OF NEW YORK.

STATEMENT OF THE CASE.

This case comes to this court on writ of error (pp. 73-74) granted to review a judgment of the Supreme Court, State of New York, Fourth Department (p. 55), entered on an order of the Appellate Division of the said State Supreme Court (p. 53), unanimously affirming a judgment and order of the said State Supreme Court, in and for the County of Erie (pp. 42-43). Application for leave to appeal to the Court of Appeals of New York was denied both by the Appellate Division (p. 56), and by the Honorable William H. Cuddeback, Associate Judge of the Court of Appeals

(p. 57). The aforesaid judgment of the Supreme Court of New York, in and for the County of Erie, was in favor of the plaintiff, in the sum of $3,500, and costs (p. 42).

An opinion was written by the Honorable Charles B. Wheeler, Trial Judge (p. 45), and a memorandum opinion by Judge Cuddeback of the Court of Appeals in denying plaintiff in error's motion for leave to appeal to the Court of Appeals (p. 57). No opinion was written by the Appellate Division (p. 53).

The complaint alleges that the plaintiff is entitled to a recovery under the so-called Federal Employers' Liability Act, of April 22, 1908, as amended by the Act of April 5, 1910, because of injuries received by him while employed by the defendant, a common carrier by railroad engaged in interstate commerce, while he was employed by such carrier in such commerce, owing to alleged defects in an air-brake, angle-cock and a hand-brake wheel (pp. 2, 3). The answer puts in issue all the material allegations of the complaint and alleges as an affirmative defense that the plaintiff's injuries were due to the negligence of a competent fellow-servant (p. 5), which, if sustained by proof, constitutes a complete bar to recovery under the State Law, but not under the Federal Act. In the complaint and at the trial the plaintiff contended that he also had a right of recovery under the common law of the State and the State statutes, but the case was sent to the jury solely under the Federal Employers' Liability Act (pp. 39, 40, 41 and 42), the only question

left for their determination being as to whether or not the plaintiff's fellow-servant was negligent (p. 41).

The sole question for review upon this writ of error is, therefore, as to the applicability of the Federal Employers' Liability Act, to the facts and circumstances of this case.

FACTS.

On November 18, 1910, the plaintiff was a brakeman in the employ of the defendant (pp. 9, 25); and at the time of the accident was one of the crew on what is known as a pick-up freight train running from Rochester, N. Y., to East Buffalo, N. Y., via the Falls Road, and the Lockport Branch (p. 9). This train dropped cars and picked up cars at the various stations along the road (pp. 9, 10, 11), the run being entirely within the State of New York.

When this train reached North Tonawanda, at about 10.45 P. M. (p. 12), it was composed of 28 cars (p. 11), several of which were loaded with freight for, and billed to, points outside of the State of New York, and others of which carried local shipments from point to point within the State (pp. 10, 11; Ex. "C." between pages 52 and 53). Among these local or intrastate cars were two that had been picked up at Medina, N. Y.,—one, New York Central gondola No. 71385, loaded with stone and billed from Eagle Harbor, N. Y., to North Tonawanda, N. Y., and the other Pennsylvania box car No. 576204, loaded with pipe and

billed from Medina, N. Y., to Batavia, N. Y. (pp. 11, 16, 32, 34, 45). Both these cars carried freight originating at a point within the State and destined to a point within the State (pp. 11, 16, 33, 35), and moved over a wholly intrastate line. These two cars were at the head end of the train immediately behind the engine and tender in the following order: Engine, tender, gondola car, box car (pp. 12, 21).

It was necessary to cut these two cars out of the train, at North Tonawanda, for the purpose of leaving the gondola, which had arrived at its destination, to be unloaded by the consignee, and to permit the box car to be hauled to Batavia over the branch of the defendant's road running from North Tonawanda to Batavia, known as the "Peanut" (p. 17). On arriving at North Tonawanda, brakeman O'Brien, who had charge of the head end of the train, and the plaintiff, set about placing these two head cars on the siding known as the Lockport Branch, which runs parallel and adjacent to the main track on which the train had pulled in (pp. 12-13). The train was cut just behind the Pennsylvania box car (p. 19), and the engine pulled the two cars up over the switch, which O'Brien opened (pp. 19, 23 and 26). The rest of the train, including all the interstate cars, remained on the main track during the subsequent operations which led up to the accident (p. 13). Carr, in accordance with his orders, got on top of the rear end of the box car preparatory to setting the hand-brake to hold the cars safely on the siding when they should be placed (pp. 19, 26, 28,

29). The engine backed the cars in and brought them to a stop on the siding (pp. 19, 23, 24, 29). O'Brien started to make the cut between the tender and the gondola (p. 19). He first shut off the air on the tender by turning the angle cock on the engine side of this connection. He then attempted to shut the air off on the car side, but for some unexplained reason the angle cock stuck and he was not able to turn it (p. 19). Without turning this cock which had stuck, by the use of tools or otherwise (p. 22) and without turning either of two other angle cocks which were available (p. 21), O'Brien uncoupled or "broke" the compressed air hose (p. 19). At this moment Carr was engaged in setting the hand brake on the Pennsylvania car (p. 26). The effect of "breaking" the air hose without first turning the angle cock was to release the compressed air in the tanks under the cars, which would not have occurred had the angle cock been turned before the hose was "broken," and consequently to set the brakes as in emergency (pp. 19, 21), and at the same time cause the wheel used to set the brakes by hand to revolve rapidly (p. 14) In this instance the hand-brake wheel which Carr was operating, not only revolved, but revolved in the direction opposite to that in which it must be turned in order to set the brake (pp. 20, 29). It appears that there are two types of Pennsylvania car, one on which the hand wheel revolves in the same direction that it is being set, and one on which it revolves in the opposite direction (p. 13).

As the plaintiff was at that moment on top of the box car in the act of setting the hand-brake, the sudden reverse motion operated to throw him to the ground, thereby breaking the heel bone of his right foot (pp. 26, 29). It appears that the correct and customary method is to turn the angle cock before uncoupling the air hose (pp. 23, 24). It further appears that the accident would have been avoided had O'Brian turned the angle cock either on the other end of the gondola car, or on the nearest end of the box car (p. 21), since that would have kept the air pressure on the Pennsylvania car. These are the undisputed facts upon which the question as to the application of the Federal Act must be determined. The trial court held that the Federal Act is applicable to these facts (p. 37), and consequently sent the case to the jury on the question of O'Brien's negligence, and on that question alone (pp. 37, 40, 41), and held that on no other grounds was the plaintiff entitled to recover (p. 37), and refused to send the case to the jury, except under the Federal Act. (p. 37).

SPECIFICATION OF ERRORS.

The plaintiff in error relies upon the assignments of error in raising the following questions of law:

First. That the trial court erred in refusing to dismiss the complaint, in submitting the case to the jury and in denying defendant's motion for a new trial;

a. For the reason that the cause of action proved and submitted to the jury, was based exclusively upon the Federal Employers' Liability Act, and that such Act, when properly construed, has no application to the facts as proved without dispute on the trial of this case, inasmuch as neither defendant nor plaintiff was, at the time and place of the accident, engaged in interstate commerce, or commerce between the United States and a foreign nation, or commerce within a territory of the United States (Assignments I. II and III; pp. 67, 68).

b. For the reason that under no statute of the State of New York was the defendant made liable for the negligence of brakeman O'Brien, and that there were no facts proved or submitted to the jury to show negligence of the defendant on any other ground than that of the negligence of brakeman O'Brien (Assignments IV, V, VI; p. 68).

SECOND. The trial court erred in instructing the jury that if they found that brakeman O'Brien's negligence caused the accident they should find a verdict against the defendant, and in refusing to charge the jury as requested that if they found that Brakeman O'Brien's negligence caused the accident, the verdict must be in favor of the defendant, of no cause of action (Assignments X, XI, XII; pp. 68, 69).

THIRD. That the Federal Employers' Liability Act, when properly construed, has no application to the facts as proved without dispute on the trial of this case (Assignments I-VI, XIV; pp. 67-69).

POINT I.

Recovery cannot be sustained under the Federal Employers' Liability Act, because neither the plaintiff nor the defendant was, at the time and place of the accident, engaged in Interstate Commerce.

Since the passage of the Federal Employers' Liability Act certain principles relative thereto have become firmly established through the decisions of this court.

First. If the injury occurs while both employer and employee are engaged in interstate commerce, the Federal Act undoubtedly controls, and no recovery can be had under the common or statute law of a State. In other words, the Federal Act is exclusive in operation and not cumulative.

Second. If the injury occurred outside interstate commerce, the Federal Act is without application, and the law of the State is controlling.

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1, at 53-55.

St. L. S. F. & T. R. Co., vs. Seale, 229 U. S., 156, at 158.

North Carolina R. Co. vs. Zachary, 232 U. S., 248.

Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492.

Wabash R. Co. vs. Hayes, 234 U. S., 86, at 89.

The present recovery can be sustained only in case the Federal Act governs the facts of this case, since the case was submitted to the jury solely upon the question of O'Brien's negligence, which is not a defense under the Federal Act, but is under the Laws of the State of New York. The trial judge specifically submitted the case solely under the Federal Act (pp 37, 39-42).

It has further been held that the burden is on the party relying upon the statute to prove that the work in which the employe was engaged at the time he received the injuries complained of was interstate; in other words, to prove that he is entitled to the benefit of the act.

Knowles vs. N. Y. C. & H. R. R. R. Co., 164 A. D., 711 (150 N. Y. Supp., 99), at 711.

McAuliffe vs. N. Y. C. & H. R. R. R. Co., 164 A. D., 846 (150 N. Y. Supp., 512), at 581.

We are then brought to the question as to whether or not the plaintiff has shown facts which bring the situation within the purview of the act.

That Congress has the power to regulate the liability of a carrier for injuries suffered by an employe, in the course of his general work, even when at the time of the injury the particular service which he was performing was, isolatedly considered, purely intrastate, is no longer an open question.

Illinois Central R. Co. vs. Behrens, 233 U. S., 473, at 477.

This court has held, however, that while this power undoubtedly has been confided to Congress by the Commerce Clause of the Constitution, Congress has not seen fit in the Act in question, to exercise it to the fullest Constitutional extent, but has confined the operation of the statute to injuries occurring when *the particular service* in which the employee is engaged, *is a part of interstate commerce.*

> *Illinois Central R. Co. vs. Behrens,* 233 U. S., 473, at 477.
> *Mondou vs. N. Y., N. H. & H. R. R. Co.,* 223 U. S., 1, at 52.

It is this distinction between the extent of the power conferred upon Congress by the Constitution and the extent to which Congress has exercised it, that the trial court failed to perceive (p. 49, 50). The provisions of the statute so far as they are material to the present controversy are as follows:

> *"An Act relating to the liability of common carriers by railroad to their employees in certain cases.*
>
> BE IT ENACTED by the Senate and House of Representatives of the United States of America, in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories

> or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In the Second Employers' Liability Cases (*Mondou vs. N. Y., N. H. & H. R. R. Co.*, and two other cases, 223 U. S., 1), which held the Act constitutional, no definite rule was laid down by which it can be determined what situations do and what do not fall within the scope of the act. In each of the three cases there before the court, both the railroad and the employee were obviously engaged in interstate commerce at the time the accident occurred. In the first two cases, the employee was actually engaged in the movement of an interstate train. In the third case, the employee was "replacing a draw-bar on one of the defendant's cars then in use in such commerce." The court there said no more than that under a certain interpretation of the act it is constitutional, but did not say what the interpretation is. Since that decision, there have been other cases before this court (notably, the cases of *Pedersen vs. D. L. &*

W. R. R. Co., 229 U. S., 146, and *Illinois Central R. Co. vs. Behrens*, 233 U. S., 473), wherein certain general guiding rules of interpretation have been laid down.

In the *Pedersen* case an employee of an interstate railway was injured by being struck by a train operated by that railway while he was carrying to a bridge which was being repaired a sack of rivets to be used in the repair work. The bridge was regularly in use in both interstate and intrastate commerce. The court held that such a case falls within the Federal Act, and said at page 151:

> "The statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determines regardless of its relation to others, or to the business as a whole. But this is an erroneous

assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

Subsequently this court in the case of *Illinois Central R. Co. vs. Behrens*, 233 U. S., 473, if it did not cut into the *Pedersen* decision, at least clearly indicated the limits beyond which the Federal Act does not apply. The facts, as set forth in the opinion in the *Behrens* case are as follows (p. 476):

> "The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the City of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the state or vice versa; at other times was moving only between points within the state, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of the cars, loaded or empty, to a given point,

other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state."

After thus stating the facts the court goes on to say, at page 478:

"Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is part of interstate commerce. The Act was so construed in *Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' * * * Here at the time of

> the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

The sole question is, therefore, what was "the nature of the work being done at the time of the injury?" Was the work being done at that moment "a part of interstate commerce?"

There were several cars in the train admittedly carrying interstate shipments, and there can be no question but that when the crew was engaged in moving these cars they were engaged in interstate commerce. The fact that there were also purely local or intrastate cars in the train would not alter the character of the work. The intrastate cars took on the color of interstate commerce temporarily, but only because they were coupled to interstate cars, and this color vanished when they were again uncoupled. When separated and distinctly set apart from the interstate traffic, chameleon-like they resumed their normal intrastate hue. All movements of these cars after they were cut from the balance of the train, and all work done in con-

nection therewith, was solely in furtherance of intrastate commerce.

All movement of interstate commerce had ceased and for the moment the entire energies of this engine crew and brakemen were bent on a distinct car movement of intrastate character alone.

The last paragraph above quoted, from the *Behrens* case, could, without the change of a single word, be applied to the case now before the court. From the moment the cut was made between the Pennsylvania car and the balance of the train, until the time of the accident, the operation was purely local and intrastate, disconnected from all interstate movement or operation. It is not "a minor task essential to a larger one," but a separate task. As is said in the *Behrens* case, what had been done in the past and what was to be done in the future were immaterial. The sole and vital point is *what was being done at the time of the accident.*

Nor is the application and interpretation of the act contended for at variance with the decision of this court in *St. Louis S. F. & T. R. Co. vs. Seale,* 229 U. S., 156, and *North Carolina R. Co. vs. Zachary,* 232 U. S., 248. In the *Seale* case the intestate was a yard clerk and was killed while proceeding through the yard to meet an interstate train for the purpose of taking down the numbers and initials of the cars, of inspecting and making a record of the seals on the car doors, and of checking the cars with the conductor's list, and labeling them as to destination to guide the switching

crews. Such duties were necessarily a unit and the impossibility of segregating the intrastate and the interstate work renders the decision just and proper and distinguishes it from the case at bar, where the end of the interstate and the commencement of the intrastate is clear and unmistakable.

In the *Zachary* case, the deceased had prepared his engine for an interstate trip, and had left it presumably to go to his boarding house across several intervening tracks, when he was killed by being struck by a light shifting engine. There can be no doubt but that this fireman was engaged in interstate commerce while he was preparing his engine for the approaching interstate trip. Whatever his purpose in crossing the track, there is nothing to show that he had ceased this interstate work and taken up a purely intrastate duty, and therein is the *Zachary* case distinguishable from the instant case. For in the case at bar, all interstate activity ceased when the head cars were cut from the main train and drawn over the switch. At that time the plaintiff became clothed with an intrastate quality by positively discarding the interstate and actually assuming the intrastate activity. From then on, the work was purely local and intrastate. We confidently contend that such a rule is proper, and in fact the only constitutionally workable rule.

If the Federal Act applies to a case such as the present, it follows that if a man's usual duties are in connection with interstate commerce, but he also has one duty wholly and absolutely local in its nature, during the performance of which he receives in-

juries, he may claim the benefit of the act. He has had impressed upon him an indelible interstate character, of which he cannot rid himself while his employment lasts. The fact that at times he is engaged in interstate commerce robs the State of authority over him in the premises, whatever purely and local intrastate act he may be engaged in when he is hurt, and conversely it would seem that if his usual duties are in connection with purely intrastate transportation, but when he is injured he is engaged upon one isolated interstate act, that he will not be entitled to the benefit of the Federal Law. Surely, Congress did not intend this result. Under this rule the test would be not the nature of the man's act at the time of the injury, but the nature of his acts at other times. And this is the very point of the decision in the *Behrens* case. For it is there said:

> "That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

A man may change his occupation a hundred times a day from interstate to intrastate activities, and vice versa, and we contend that by the very terms of the statute its application depends upon the particular character of the business in which he is engaged at the moment the injury is received. Only by such an interpretation can the intent of Congress be effectuated.

Furthermore the statute will apply only where the acts being done "have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1, at 49.

This does not mean as has been suggested in some of the minor federal courts, that the application of the statute depends upon the effect which the injury might have on interstate commerce.

Lamphere vs. Oregon R. & N. Co., 196 Fed., 336.

It means, in the light of the *Behrens* case, that the acts being done when the injury was received, had such a vital, substantial and inseparable connection with interstate commerce as to be interstate commerce by and of themselves.

If the effect on interstate commerce were the test by which the application of the statute is to be determined, where would it not apply? As far as is shown in the *Lamphere* record, no actual delay occurred to the interstate train. True, the injury of a trainman would have a tendency to delay interstate traffic, but there is no proof that delay actually occurred, and the decision in the *Lamphere* case goes off on the theory that delay *might* have occurred. We submit that this doctrine is of no present day effect in view of the decision in the *Behrens* case. For as is there said, that in case effective regulation of inter-

state commerce required the incidental regulation of liability to employees engaged in intrastate commerce, Congress might constitutionally have made the act applicable to injuries received by employees engaged in purely local and intrastate transportation, where that transportation effected interstate operations, yet, no such regulation was enacted by Congress, but the application of the act was restricted to cases where at the time of the injury the employee was engaged in interstate commerce.

The line is drawn at precisely this point. Where the interstate and intrastate work is inseparable, the statute applies to the whole employment, but when the two classes of work are separable the statute applies only to those acts which are done in interstate commerce.

Review of Decisions in the Lower Courts.

While of course the cases of the lower Federal courts and the cases in the various state courts which interpret and apply the Federal Act, have no binding force, in this court, it is nevertheless illuminating to review some of the decisions for the purpose of seeing the trend of judicial opinion on this subject, particularly since the decisions in the *Pedersen* and *Behrens* cases were handed down. There is a great divergence of opinion as to just where the line should be drawn, when recovery may be had under the Federal Act, and when under the State law.

The following cases, however, throw some light on the situation:

In *Shanks vs. D., L. & W. R. R. Co.*, 163 A. D., 565 (148 N. Y. Supp., 1034), the injured employee was engaged in installing machinery in a general railroad repair shop, which operated both local and interstate trains, and which repaired both local and interstate engines in the shop. The Court said at page 567:

> "The employee must be himself engaged in commerce, or his work must be a part of interstate commerce under federal protection, but this is not his general line of work, but 'the particular service in which the employee is then engaged.' The test declared by the Supreme Court of the United States is the 'nature of the work being done at the time of the injury,' not what the employee expects to do after the completion of his task."

The recent affirmance of this case in the Court of Appeals reported in New York Law Journal, April 7, 1915, contains the following language:

> "It is of great importance to employers and employees that rules be established by which it can be determined with reasonable certainty whether a person at a given time is engaged in interstate or intrastate commerce. It does not seem to us that each specific act of employment by a carrier can be satisfactorily defined and qualified by generally and unqualifiedly including as a part of interstate commerce, every act of employment closely connected therewith, and every act the per-

formance of which is not a matter of indifference in such commerce."

And again:

"Whether the plaintiff can recover under the Act depends upon whether he was personally engaged in interstate commerce at the time of the injury."

And still again:

"Unless some reasonable and practical limit and boundary is prescribed in acts constituting employment in interstate commerce, every act that can be shown to have affected interstate commerce in a remote degree is included within the terms of the statute. The decision in the *Pedersen* case has been frequently referred to as extending the provisions of the act to the limit of legislative intention, and we think it should not be by us further extended."

In *La Casse vs. N. O. T. & M. R. Co.*, 135 Louisiana, 129 (64 Southern, 1012), a railroad employee in a round house whose duty it was to take care of locomotives when brought in and to get them ready for use when called for, was killed while so steaming up a locomotive the last prior trip of which was interstate commerce.

The Court said at page 132:

"If the fact that a locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, were equivalent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of its employes would at all times be engaged in interstate commerce when at their work."

And referring to the *Seale* and *Pedersen* cases, page 133:

"In those cases, although the connection was but slight, there was a direct engagement in interstate commerce, whereas a locomotive or an empty car, which had completed an intrastate run and may on its next run be used in like manner intrastate, cannot be said to be actually engaged in interstate commerce. The most that can be said is that it has been so used, if such be the fact, and that it may on its next run be so used."

In *Connole vs. Norfolk & Western R. Co.*, 216 Fed., 823: The Court says at page 824:

"An interstate carrier may, through the same employee or employees, engage at a given time in intrastate commerce and at another in interstate commerce" (citing *Behrens* case).

In *Atcheson, Topeka & Santa Fe Railway Company vs. Pitts*, ... Okla., ... (decided Jan. 19, 1915); 145 Pac., 1148, the plaintiff, a member of a road crew on defendant's road, which at the time in question was doing yard switching in making up a train for a customary run entirely within the State, was injured by being crushed between the tender and a baggage car while making a coupling at that point. It does not appear whether or not the baggage car was coupled to the rest of the train, which contained interstate cars.

Further facts, contained in the opinion of the court, page 1148, are as follows:

> "Three of the freight cars of this train had come from or were going to places in other states; but it does not appear that the said engine, tender or baggage car contained any person or thing en route from or to any place beyond this state, nor that either of these had come from or were destined to any place beyond this state. It appears that this crew, with their train, left Tonkawa each day for Ponca City, via Blackwell, returned thence to Blackwell, where it did yard switching in the afternoon, then returned to Ponca City, and thereupon returned to Tonkawa via Blackwell; and the engine, tender and baggage car were used on these lines wholly within the state."

Upon these facts this Court held that under the rule in the *Behrens* case the Act did not apply.

In *Patry vs. Chicago & W. I. R. Co.*, 265 Illinois, 310 (106 N. E., 843), affirming *Patry vs. Chicago & W. I. R. Co.*, 185 Ill. App., 361, a switchman engaged in hauling empty passenger coaches into the yards from a terminal station, where they had just arrived, most of which were cars used in interstate commerce, was injured while hauling a string of purely intrastate cars.

The lower court held that:

> "The fact remains that neither he nor appellant was at the time of his injury engaged in an act of interstate commerce."

And the court above says that under the opinion of the *Behrens* case decided after the lower court had made its decision in the *Patry* case that:

> "It is conceded that the particular service in which the plaintiff was engaged at the time of his injury was not interstate commerce within this decision and therefore no liability existed under that act."

In *McAuliffe vs. N. Y. C. & H. R. R. Co.*, 164 A. D., 846 (150 Supp., 512), the conductor of a freight train, the second day before he was injured, took his train from the New Jersey terminal into New York State, and the next day was employed in carrying freight between two New York points. The next day he was injured in a collision while returning with only a caboose to the New Jersey terminal.

The Court holds that the plaintiff is not entitled to the benefits of the Federal Act, and referring to the *Behrens* case, says at page 850:

> "The language is explicit; it isolates completely the service at the time of the injury, and ascertains whether then and there the plaintiff was employed in interstate commerce; it ignores past service; it puts from view further service, and asks what was the nature of the carrier service at the period of the accident. What was done in that case is not what was done in this instance; but the rule for testing the application of the statute is made very clear."

In *Norton vs. Erie R. R. Co.*, 163 A. D., 466 (148 N.Y. Supp., 769), a yard switchman sustained fatal injuries while assisting in moving freight cars in a railroad yard. These cars were purely local, and carried intrastate freight only. They had been brought to the yard in question on a fast through interstate freight, which, after leaving them, had proceeded on its journey. Plaintiff's intestate was riding on the side of a freight car and was knocked off by a baggage truck which had been carelessly left between the tracks by a baggageman, receiving injuries which resulted in his death. The case was submitted under the Federal Act and a verdict for the plaintiff returned. The court said at page 467:

> "At the close of the evidence the trial court held that the plaintiff had failed to make out

a case at common law or under the statutes of this state. We think that ruling was correct, and we are also of the opinion that the plaintiff failed to make out a case under the Federal Employers' Liability Act, for the reason that although defendant was engaged in interstate commerce as well as intrastate commerce, it does not appear that the particular service in which plaintiff's intestate was employed at the time he was injured was a part of such interstate commerce.

"The defendant's railroad extends through several states. Freight trains coming into the Hornell yard are broken up and new trains formed; others pass through unbroken. The general work of the yard crew, to which the deceased belonged, was shifting and classifying cars and doing general switching work in the yard. Plaintiff's intestate was injured at the time he was assisting in the work of moving six freight cars. Although the cars came in fast through freight, they were put into the train at Buffalo and left at Hornell, at no time during the trip passing out of the State. The train which brought them had proceeded on its journey several hours before the accident occurred. There is no proof that any of them contained freight coming from outside the state or that the cars were in use in interstate traffic in any way at the time of the accident. The proof is quite to the contrary.

"Under these circumstances we are of the opinion that the disposition of this case is con-

trolled by the decision of the Federal Supreme Court in the case of *Illinois Central R. R. Co. vs. Behrens* (233 U. S., 473), where it was held under similar circumstances that the case was not within the Federal Employers' Liability Act."

Especial reference is made to the case of *Van Brimmer vs. Texas & Pacific Railway Company*, 190 Fed., 394. The facts there before the court are almost identical with those in the present suit, and every word of the court's extremely careful opinion is worthy of attention. The court says at page 395:

"It is agreed that the injuries of which the plaintiff complains were received under the following circumstances: Plaintiff was a brakeman in the employ of the defendant company. On the occasion of his injuries he was engaged in the discharge of his duties as such brakeman on a freight train which was going from Big Springs, Tex., to El Paso, Tex. The train contained many cars, which were filled with merchandise from other states and were being so used to transport interstate shipments of freight. In the train was also a car filled with merchandise loaded at Dallas, Tex., and destined for Etholine, Tex.; the shipment being wholly intrastate in its character—that is, the shipment in the case of this car began and was to end within the State of Texas. When the train reached Etholine, the employees of the defendant, including the plaintiff,

undertook to 'set out' the said car destined for that place. In performing this work the engine and several cars, including the one destined for Etholine, were cut loose from the train, which was left standing on the main line, and the plaintiff and his co-employees proceeded to put the Etholine car on a side track. The conductor of the train ordered the train crew to make a 'flying switch' and in this way send the car on the side track at Etholine. The part of this service which the plaintiff was to perform was to ride on the car, which was to be side-tracked at Etholine, and while the train was in rapid motion to cut loose that car from the others. Immediately after this car was cut loose by the plaintiff, the engine and remaining cars were to be suddenly decreased in speed so as to produce the effect of sending the Etholine car upon one track at rapid speed, and then before the engine and balance of the cars could reach the switch it would be thrown by the switchman so as to send the engine and other cars upon another track. In attempting to perform the work in this manner, the engineer suddenly stopped his engine before the Etholine car was cut loose, and the plaintiff was thereby jerked off of that car, thrown to the ground, and injured.

"The negligence relied upon by the plaintiff was the act of the conductor in ordering the 'flying switch' and of the engineer in stopping the engine too suddenly.

"The decision of the motion to remand rests upon two propositions: Was the plaintiff at the time of the injury engaged in an act of furtherance of interstate commerce; * * *

After discussing the history of the First and Second Federal Acts, the court goes on to say, at page 397:

"Turning to the facts in the case at bar: The plaintiff was a brakeman on a train of the defendant which contained cars being used for interstate shipments of freight. In the train was a car which was filled with merchandise destined for a point within the state. The shipment of this car originated in Texas, and was to end in that State. When the plaintiff was injured, he was engaged in the work of completing the transportation of that instrastate car. He, with others, was doing the final work of landing that car at its destination and was doing no act towards furthering the interstate business of the railroad company. Neither the railroad company nor the plaintiff nor any of his fellow employees were, at that time, '*engaging* in commerce between any of the several states'; but they were 'engaging' in an act in furtherance of the purely domestic and intrastate commerce of the defendant. That being so, the provisions of the act of Congress, known as the 'Employers' Liability Act,' do not apply." * * *

This case, we maintain, enforced the correct rule, and in fact the only reasonable and workable rule. It is the only rule which follows the wording of the law, and applies it where and only where the railroad and the employee are engaged in interstate commerce at the moment of the accident.

CONSIDERATION OF PLAINTIFF'S ARGUMENTS

1. In the Court below reliance was placed by the plaintiff on the following phraseology of the *Mondou* case, 223 U. S., 1, at page 51:

> "The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. vs. United States*, 222 U. S., 20, 27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it."

There is no question but that this is an accurate statement of the law. In effect, it has been affirmed and explained by the *Behrens* case upon the ground, as appears from the quotation itself, that the Court was speaking of the *power* of Congress, and not of the extent to which Congress has *exercised that power* in the Federal Act. As applied to the power the language is accurate. In reference to the application of the Act as passed, it was not and would not have been used. Consequently the position of the defendant, that the plaintiff had ceased temporarily from being an interstate employee when injured, and, therefore, was without the purview of the Act, does not conflict with this statement in the *Mondou* case, even though it be assumed that the effect of the injury was deleterious to interstate commerce. That is not the criterion of the applicability of the Act. Unless the employee is engaged in interstate commerce at the time of the accident, it matters not at all how much the injury to him may affect interstate commerce. The death of a train dispatcher while seated at the breakfast table may tie up interstate commerce for a time, but this would not qualify the eating of his breakfast as an act in interstate commerce.

The plaintiff in his brief below based the same argument on statements in the Safety Appliance case, *Southern Railway Co. vs. United States*, 222 U. S., 20, page 27, similar to that in the *Mondou* case above quoted. In the Safety Appliance Act, however, Congress did exercise its constitutional power to the fullest extent, and the application

was not restricted as in the Employers' Liability Act by the very terms of the enactment; but the argument as applied to the present case is fallacious for that very reason. In this failure to distinguish between the extent of the power of Congress and the extent of its exercise in the Act lies the error of the Trial Court. In its opinion, denying the defendant's motion for a new trial, Judge Wheeler said (p. 48):

> "Is not the sounder and wiser view to regard such a train crew as retaining all the time, even when performing isolated acts relating to intrastate commerce, the legal relationship of men engaged in moving interstate commerce and entitled to the protection of the federal statute?"

and held that this view was sustained by the *Mondou* and *Southern Railway Co.* cases, above cited, relying on precisely the language above quoted, and referred to, and continued (p. 50):

> "If we assume that the immediate act of placing the two cars on the siding at Tonawanda was not an act of interstate commerce, nevertheless that fact or circumstance the Supreme Court says is not controlling in determining the liability of the defendant under the federal statute. The fact that the negligent employee is engaged in intrastate commerce at the time does not control, but as the Court said it is 'the effect of the injury upon interstate commerce' which is the criterion

of Congressional power to legislate on the subject."

Measured by the rule subsequently laid down in the *Behrens* case, this is clearly erroneous, and had the learned Trial Justice had that opinion before him we are confident that his decision would have been vastly different.

2. It was urged below that as the plaintiff had no means of knowing whether the cars that were cut out were local or interstate, the defendant cannot be heard to say that they were local and had lost the interstate character that they assumed when attached to the train. The answer is obvious. The character of the work is governed and determined not by the mental state of one or more employees, but by the existing facts as to the train movement the moment of the accident.

3. It has been urged that it is an anomalous situation that an employer's liability to his employee may be governed by one rule at one moment, and by an entirely different rule at the next, although the employee is all the time engaged in precisely the same kind of work. Such a situation is not unusual. The existence or non-existence of liability under some statute or rule of the common law is frequently determined by the precise relations existing between the parties at the instant of the accident. In many classes of cases the courts make rather fine distinctions between the relations which may exist at one hour and those

which may exist an hour later; between those which usually exist, and those which may exist under circumstances slightly, yet vitally, changed.

For example, though a servant be in the general employ of one master, if his services are temporarily loaned to another, no matter for how brief a time, no matter how exceptional the occurrence, the rules of liability may be fundamentally different.

Standard Oil Co. vs. Anderson, 212 U. S., 215.

Again, the workmen's compensation acts usually provide for a recovery where the employee is injured or killed in an accident "arising out of or in the course of his employment."* The solution of the question whether a particular accident falls within this category has never been made to depend upon the usual employment of the servant, or the indirect effect of the disability of the servant upon the master's service. On the contrary it has been held that if the servant departed only for a moment from the performance of his service he ceased to be entitled to the benefits of the statute. Thus in *Reed vs. Great Western Ry. Co.* (1909), A. C., 31, the House of Lords held that a locomotive engineer who momentarily left his engine, went across the tracks to procure a book for his private use, and was struck by a moving car while returning to his engine, was not entitled to compensation under the English Act.

* Compare the very similar language with the Federal Employers' Liability Act "While he is employed by such carrier in such commerce."

Why do not similar departures from interstate commerce for the purpose of engaging in intrastate commerce fall outside of the scope of the Federal Act, even though they be temporary and unusual? Where the line between interstate and intrastate commerce can be drawn with logical exactness, what excuse is there for either the Federal or the State law overstepping the line?

If it shall be deemed to be in the interests of social justice that Congress regulate this subject to an extent commensurate with its power for the purpose of avoiding this claimed anomaly, or for the sake of a supposedly desirable and convenient uniformity of legal remedies, let Congress so act. It is a matter for legislation.

> *Barlow vs. Lehigh Valley R. R. Co.*, 214 N. Y., 116, page 221.

But until Congress has taken such a step, an extension of the interpretation or application of the existing statute beyond its clear and explicit terms by judicial decision would be a violation of the principle well stated by Mr. Justice Hughes in the *Minnesota Rate* cases (230 U. S., 352, at p. 433):

> "It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon."

From the review of the cases in the lower courts and the examination of the plaintiff's contentions,

it is apparent that the rule in the *Behrens* case must be closely adhered to and the line of distinction there laid down followed with exactness. There must be an actual personal act done by the employee at the moment of the accident in furtherance of a real interstate movement. The connection with interstate commerce must be personal and vital. Measured by this rule the present case falls without the statute.

FINALLY.

The judgment appealed from should be reversed and the court below directed to enter judgment in favor of the defendant dismissing the complaint.

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PRESS OF "THE BUFFALO COMMERCIAL."

Supreme Court of the United States

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff-in-Error,

against

BERNARD J. CARR.

BRIEF FOR DEFENDANT IN ERROR.

On the assumption that the sole question here for review is as to the applicability of the Federal Employer's Liability Act, the statement of facts by plaintiff in error is sufficient.

The case was submitted by the court to the jury under that Act, and, of course, if that was error, a new trial must be granted.

The assignments of error, however, seem to go further, and claim that the court had no right to submit the case to the jury, even though the Federal Act did not apply, on the ground that the injuries were caused by the negligence of a fellow servant, and for that reason, under the Common Law as interpreted by decisions of the State of New York, recovery is precluded.

It will be noted, however, that while the court submitted the case to the jury under the Federal Act on the question of the negligence of a fellow servant as the cause of the injury, counsel for defendant in error, plaintiff at the trial, asked that the case also be sent to the jury "under the Common Law, on the ground that the defendant failed to warn and instruct the plaintiff concerning the existence of this brake, and that the existence of that brake in the train was negligence, unless the plaintiff was warned and instructed, and that the defendant failed to inspect its train, or the particular portion thereof, prior to the accident." (Page 74 original Record).

There was sufficient evidence in the case of negligence upon the part of the railroad company, with reference to the brake in question, and the maintenance, condition and inspection thereof. Of course, negligence of the railroad company in this respect, if any, would require the submission of this case to the jury, regardless of the fellow servant rule and also of the Federal Employer's Liability Act. So, if this judgment is reversed, the court will not, we take it, assume to hold that the case is not for the jury at all, because it is, or will be, on a new trial so submissible on another theory than under the Federal Act, viz., negligence of the railway company as to machinery, appliances and inspection.

Our discussion of the case will, therefore, be confined exclusively to the question as to the applicability of the Federal Act.

POINT I.

As plaintiff in error, the railroad company, was engaged, and defendant in error, plaintiff at the trial, was employed, at the time of the accident in interstate commerce, and as those facts were alleged and proven at the trial, the Federal Employer's Liability Act was correctly applied.

It is conceded that the freight train being operated by the railroad company, consisted, at different times during the trip in which the accident occurred, of from twenty-eight to thirty-four freight cars, and that while its route was from Rochester, N. Y., to Buffalo, N. Y., a number of the cars in said train contained, and were carrying, before, at the time of, and after the accident to the end of the trip, interstate freight—that is, freight consigned and destined, as were the cars carrying such freight, from points within the State of New York to points outside said State.

It is also conceded that defendant in error was employed by the railroad company as brakeman on this train, and was engaged in acting as one of a crew running and operating the train on its

run from Rochester to Buffalo. It was a part of the operation and movement of the train to take on and cut out cars at the different intermediate stations between Rochester and Buffalo, as the train passed along. That was being done. Two of said cars were cut out and left at North Tonawanda, one of said intermediate stations. It was while this was being done, and while defendant in error was engaged, together with other operators of the train, in doing this, that the accident occurred. It appears that the two cars thus being cut out, contained intrastate freight, and the point at which these cars were taken on and were to be left were in the State of New York.

While the train was being moved, during the whole trip, and when it reached North Tonawanda, some of the cars in it were concededly interstate as to points of origin and destination. When the train stopped at North Tonawanda, the two cars destined to points within the State, and carrying intrastate freight were next to the engine and were there cut out of the train, and the engine which was moving the train enroute, moved these cars to the track where they were to be left, and while this was being done, and while defendant in error was engaged in his duties as a brakeman for that purpose, then to go back to the train to continue his duties as brakeman thereon for the rest of the trip, the accident happened.

These and other material facts may be found in the record to which we refer, with references to the original record pages, as follows:

At the time the train left Rochester, it had 34 cars (p. 19).

It took on cars at various stations along the road, and left off cars at these stations (p. 19).

Sometimes the cars destined for one point are put together, and sometimes they are scattered through the train (pp. 19, 20).

The conductor testified:

> "So that in a pick-up train like this, cars are likely to be moved back and forth in the train at any station, depending upon the exigencies of the traffic. That is all done by the same crew. We do not have one crew for the cars that go out of the state, and another crew for the cars that stay in the state" (p. 20).
>
> "Cars were taken on at Medina that were going to Collingwood, Ohio; Memphis, Tenn.; Pittsburg, Pa.; and Indianapolis, Ind. These were all taken on at one time" (p. 20).
>
> "We did not take any cars with foreign destination out of the train before we got to Tonawanda. They were in the train at the time we got to Tonawanda. At the time we got to Tonawanda, we had twenty-eight cars

in the train, including the two cars left at Tonawanda. About eight cars, destined for points outside the State of New York were in the train at the time we left Tonawanda. They were scattered through the train. When we got to Tonawanda, we were going to cut out some of those cars" (pp. 20, 21).

"I gave orders to the two brakemen that were on the head end of the train, Brakemen O'Brien and Carr. I told them that the two head cars went to Tonawanda; to set them in on the Lockport Branch. These were the two head cars on the train. They had been proceeding as a part of this train down to this point, and we wanted to get rid of them, and go on with the rest of the train" (pp. 21, 22).

"The movement that had to be made to get those cars off the head end of the train was to cut behind the two cars, and draw up over a switch, and back them in on the track. The engine did do that. Then the engine would cut loose from these two cars, and return to the train, couple on to the balance of the train and proceed. THE BALANCE OF THE TRAIN COULD NOT PROCEED UNTIL WE GOT THOSE CARS OFF THE HEAD END AND PLACED THEM ON THE SIDE TRACK" (p. 24).

"Sixty-five cars were handled during the movement from Rochester to Tonawanda" (p. 29).

"As we got along at these different stations where we took off cars from our train, we would put them in on the siding, and take on cars and attach them to our train. In that movement, it was necessary to cut off the engine and attach it a great many times from the time we left Rochester" (p. 30).

"After leaving Medina, and before reaching North Tonawanda, we made shifts in our train by taking cars out, or putting in others. We left four cars after leaving Medina, at Gasport. We took on five at Middleport, left two at Lockport and picked up seven at Lockport" (p. 32).

The car that caused the accident was a Pennsylvania car.

"The Pennsylvania Road is a line of railroads operating through the State of Pennsylvania, with branches running into the State of New York. In the operation of our cars, we find cars on our tracks from various railroads all over the United States.

"We handle on the New York Central on that run, cars from all over the country, from nearly all the roads of the country. We handled a great many Pennsylvania cars in that year" (p. 34).

The train sheet, Exhibit C, at page 52, of the record, gives a list of the cars in this train, with the names of the roads to which they belonged and their destination. There were cars belonging

to the Grand Trunk, The Missouri, Kansas and Texas, the Big Four, the Camden and N. J., The Pennsylvania, the Wabash, the Michigan Central, the Lake Shore and Michigan Southern, the Southern, The Baltimore & Ohio, the Boston and Maine, and several other foreign railroad corporations. Some of the cars were destined for domestic points, and others for Ohio street, Buffalo, where their freight was to be loaded on the Lake boats, Cleveland, Ohio; Memphis, Tenn.; Pittsburgh, Pa.; Indianapolis, Ind.; Collingwood, Ohio, and Kankakee.

The defendant's answer admits:

> "That the defendant was a common carrier, engaged in interstate commerce, and commerce with the Dominion of Canada" (p. 8).

The plaintiff's duty was to set the brakes on the two cars that were to be cut off at North Tonawanda. These two cars were disconnected from the head of the train, and the engine pulled them ahead, and then backed them onto a switch. Then the brakeman O'Brien, attempted to disconnect the cars from the engine. Before doing this, he was supposed to shut off the air. Owing to some unexplained defect in the air connections, he was unable to shut off the air, and broke the hose without shutting the air off (p. 38).

The conductor said:

> "I have run across cars of this older type of Pennsylvania car, where the brake handle

will whirl around in the opposite direction, when the air is let out. When the air is permitted to escape from such a car, the brake wheel will suddenly revolve in the opposite direction with considerable force" (p. 38).

"If the air is released on a New York Central car, and the hand brake is set by hand, it remains tight" (p. 26).

The plaintiff (at the trial) was setting the brakes in the usual way when the air was released. This caused the brake wheel to jerk suddenly in the opposite direction, throwing him off the car, and causing the injuries complained of.

He testified:

"I knew nothing about a peculiarity in certain Pennsylvania cars by which, when the air was suddenly permitted to escape, this wheel would do what it did to me. I had never heard of that before. That was the first one I ever came in contact with, that worked that way" (p. 51).

" I had never, during the year that I worked there, seen or known of any other car, that, when the air hose was broke, and the air permitted to escape, would suddenly jump the brake handle in the reverse direction" (p. 54).

LAW.

While this court has, by numerous decisions, established the principles controlling this case,

just the precise question involved has not, as we can learn, been passed upon by it. But according to the principles of said decisions, it clearly follows, we think, that plaintiff in error was engaged, and defendant in error was employed at the time of the accident and injury, in interstate commerce. It cannot be questioned but that the plaintiff in error was so engaged. That is admitted generally (p. 19). It was at this time operating a train on its line, consisting partly of interstate cars loaded with interstate freight.

The only question which may be said to be debatable is whether or not defendant in error was, at the precise time of the injury, employed in interstate commerce.

There are some cases like the Behrens case, (223 U. S., 473) where employees are engaged at the time of the injury in an isolated act of moving intrastate cars from one point to another not connected with, or related to interstate commerce, although such employee may have been just before, and might be just after, engaged in so moving interstate cars, wherein the employment is held to be intrastate, but that is not this case.

The presence of interstate cars in the train made it an interstate train. That is beyond question, and this made all the cars in the train interstate cars, *as pertaining to workmen employed on them.*

(Southern R. Company vs. U. S., 222 U. S. 20).

The employment of the employee in this case was, therefore, the operation and movement of an interstate train. Part of the duties of so operating said train was the taking on and cutting out and leaving at various stations along the route, of cars constituting a part of said train. The duty of doing that was the same in character as any duty on the train while it was in motion on the trip. It could not be said, for instance, if, while the train was moving from one station to another, the employee should happen to be on an intrastate car operating the brake on that car in the movement of the train, that he would not be employed in interstate commerce.

In whatever the employees operating this train had to do with any particular car in it in performing their duties of running the train, whether such car was, in itself, and the freight it carried, interstate or intrastate, they were engaged in an employment within the Act.

(Southern R. Co., vs. U. S., 222 U. S., 20).

While, therefore, any of the crew were employed on or in connection with the engine drawing the train and the two so-called intrastate cars in the cutting out process, they

were still in interstate employment. Indeed, so far as the employment of the operatives of this train was concerned, there were no intrastate cars in it.

While the employee was cutting out the two so-called intrastate cars at North Tonawanda, together with the engineer and other employees engaged in operating said train, their duties were not separate in character or connection, or isolated, from the other duties of operating said train during the trip, as, for instance, in the Behrens case. Such duties were immediately performed with reference to and upon a part of the interstate train and related to and were a part of, the general movement of the train on its route.

The other cars of the train, including interstate cars, were standing on the track, awaiting the return of the engine and the employees engaged in the cutting out movement, including defendant in error with the purpose of proceeding on the trip when the cutting out process was finished. Everything that was being done in connection with the cutting out movement, was being done for the purpose of getting the interstate train to Buffalo, of moving it on its route. Before the employees could get back to the train, and resume its movement, the cutting out process and the coupling braking and shunting incident thereto, had to be done. Their whole object in doing these things was to get back to the train and

continue its movement. Those were necessary details to be performed in moving this interstate train to its destination. They were inseparable from the general duties of operating and running the train. In the due course of commerce and transportation the train could not proceed until these things were done.

Within the Behrens case (233 U. S. 473) "the nature of the work being done at the time of the injury" was interstate. And, as said in the Pedersen case, (229 U. S. 146) this cutting out movement was "a minor task which was essential to a larger one." And, as said in the Mondou case (223 U. S. 1), the acts being done had "a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged." And also, measured by the effect the injury might have on interstate commerce, we are within the act as held in the Lamphere case. (196 Fed. 336).

Here the employee was certainly as much employed in interstate commerce as was the employee in the Seale case (229 U. S. 156; 33 S. C. 651) where he was injured while walking across a track going to an interstate train upon which he expected to be employed.

In the Pederson case (229 U. S. 146; 33 S. C. 648), the employee was carrying a keg of bolts for the purpose of being used to repair a bridge used

in interstate traffic. He was not at the particular time of the injury engaged immediately in interstate commerce, nor was the keg of bolts he was carrying a subject of interstate transportation. He was simply proceeding to a place for the purpose of carrying to that place a thing to be used in repairing a bridge used in interstate traffic.

In the case at bar the employee was not only working upon the part of the interstate train which had been cut off at North Tonawanda and was doing that work as a part of the general movement of the train and which was necessary to such movement but he was proceeding while doing the work back to the train for the purpose of moving it on to Buffalo.

In the Zachary case (232 U. S. 248; 34 S. C. 305) the employee had just finished work on an interstate engine and while then proceeding to cross the tracks that intervened between said engine and his boarding house on his way to the latter place was run over by a yard or shifting engine not engaged in interstate traffic. It would seem that the employee in that case was much farther away from interstate employment than was the employee in the case at bar.

IN NORFOLK & WESTERN RY. CO. VS. ERNEST (229 U. S. 114) the employee, whose recovery was affirmed, was injured while walking in advance of an engine piloting it across switches

in the railroad yards to the main track where it was to be attached to an interstate train to assist in moving it up a grade. Neither the engine, nor the employee piloting it, was at the precise time, actually engaged in interstate commerce, but they were proceeding to a point where they expected to be so engaged.

In the Lamphere case (supra) a fireman on an engine was injured while approaching a station at which he was to take a train for transportation to another station to relieve the crew of an interstate train.

From the facts in the case at bar, as said in Pittsburg, C. C. & St. L. Ry. Co. vs. Glynn, 219 Fed. 148,

> "We can draw no inference from these and other familiar decisions of the Supreme Court (including the Behrens case, 233 U. S. 473-7; 34 Sup. Ct. 646) * * * and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general indiscriminate character not segregated and tied to shipments within the state * * * but applicable at least as well to the interstate commerce which the carrier is conducting."

See also the following cases:

Grand Trunk & Western Ry. Co. vs.

Lindsay, 233 U. S. 42; 34 S. C. 581.
St. Louis, Iron Mt. & Southern Ry. vs. Hesterly, 228 U. S. 702; 33 S. C. 703.
Seaboard Air Line Ry. vs. Moore, 228 U. S. 433; 33 S. C. 580.
Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S. 1; 32 S. C. 169.
Seaboard Air Line Ry. vs. Duvall, 225 U. S. 477; 33 S. C. 790.

POINT II.

The judgment should be affirmed with costs.

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